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IN THE

Supreme Court of the United States

October Term, 1963

No. 823

SHENANDOAH VALLEY BROADCASTING, INC., ET AL.,

Petitioners,

against

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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INDEX TO PETITION

	PAGE
CITATIONS TO OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTES INVOLVED	3
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	8
CONCLUSION	16
APPENDIX A—Names of Petitioners	A1
APPENDIX B—Opinion of Court of Appeals	B1
Judgment of Court of Appeals	B11
APPENDIX C—Opinion of District Court	C1

CITATIONS

Cases:

Allen Calculators, Inc. v. *National Cash Register Co.*, 322 U. S. 137	11
Bell v. *Hood*, 327 U. S. 678	11
Blossom v. *Milwaukee Railroad Co.*, 1 Wall. 655	15
Cincinnati, I. & W. R. Co. v. *Indianapolis Union Ry. Co.*, 279 Fed. 356 (6th Cir.)	15

PAGE

Magee-Hale Park-O-Meter Co. v. *Vehicular Parking, Ltd.*, 180 F. 2d 897 (3rd Cir.) 13

Missouri-Kansas Pipe Line Co. v. *United States*, 312 U. S. 502 9

Sam Fox Publishing Co. v. *United States*, 366 U. S. 683 ..... 8, 10

St. Louis-San Francisco R. Co. v. *Byrnes*, 24 F. 2d 66 (8th Cir.) 15

United States v. *California Cooperative Canneries*, 279 U. S. 553 ..... 8, 9

United States v. *Paramount Pictures, Inc.*, 334 U. S. 131 12

Wometco Television and Theatre Co. v. *United States*, 355 U. S. 40 12

Statutes:

28 U. S. C. §1254 (1) 2

28 U. S. C. §1291 ..... 3, 8, 13

Expediting Act of February 11, 1903, 32 Stat. 823, as amended, 15 U. S. C. §29
Section 2 ..... 2, 3, 4, 6, 8, 9, 10, 13, 16

Rules:

Federal Rules of Civil Procedure, Rule 71 ..... 3, 5, 10, 15

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners*, the owners and operators of 364 domestic television stations, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above-entitled case on May 7, 1963.

Citations to Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit, dated and filed on May 7, 1963, reprinted in Appendix B, *infra*, is reported in 317 F. 2d 90.

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* The names of all of the petitioners are set out in Appendix A, *infra*.

The opinion of the United States District Court for the Southern District of New York, filed on September 14, 1962, reprinted as Appendix C, *infra*, is reported in 208 F. Supp. 896.

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was dated and entered on May 7, 1963. The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1).

Questions Presented

A consent decree entered in an action by the United States against respondent under the Sherman Act provides that, upon application by a music user for a music license, respondent shall quote a reasonable fee for the license requested, and that if the parties cannot agree upon the fee the applicant may apply to the United States District Court, Southern District of New York, to fix one. Petitioners applied to respondent for music licenses. When the parties were unable to agree upon a fee for the licenses requested, petitioners applied to the District Court to fix one. The District Court dismissed the application on the ground that petitioners were not entitled under the decree to the type of license they requested. When petitioners sought to take an appeal to this Court, the Court dismissed the appeal for "want of jurisdiction." Thereafter, when petitioners sought to prosecute an appeal to the Court of Appeals for the Second Circuit, that court dismissed petitioners' appeal on the ground that the Expediting Act invested this Court with exclusive appellate jurisdiction.

The questions presented are:

1. Whether the Expediting Act deprives the Court of Appeals of jurisdiction to hear the petitioners' appeal.

2. Whether petitioners, although not parties to the decree, have standing, as members of a class expressly accorded the right to apply to the District Court for certain relief thereunder, to appeal to the Court of Appeals from the District Court's judgment dismissing their application under the decree.

Statutes Involved

Rule 71 of the Federal Rules of Civil Procedure provides:

> When an order is made in favor of a person who is not a party to the action, he may enforce obedience to the order by the same process as if he were a party; and, when obedience to an order may be lawfully enforced against a person who is not a party, he is liable to the same process for enforcing obedience to the order as if he were a party. 28 U. S. C. Rule 71.

Section 1291 of Title 28 of the United States Code provides:

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. As amended Oct. 31, 1951, c. 655, §48, 65 Stat. 726; July 7, 1958, Pub. L. 85-508, §2(e), 72 Stat. 348.

Section 2 of the Expediting Act provides:

> In every civil action brought in any district court of the United States under any of said Acts, wherein the United States is complainant, an appeal from the final judgment of the district court will lie only to the Supreme Court. Feb. 11, 1903, c. 544, §2, 32 Stat. 823; as amended, 15 U. S. C. §29.

Statement of the Case

Respondent American Society of Composers, Authors and Publishers (referred to hereinafter as "ASCAP") is an unincorporated association of approximately 8,812 composers, authors and publishers of copyrighted music. ASCAP is and for many years has been in the business of issuing music licenses to music users, including television broadcasters (R. 154a-155a).[1]

An amended consent decree entered by the District Court for the Southern District of New York on March 14, 1950 in an action brought by the United States against ASCAP under the Sherman Act provides, *inter alia*, that ASCAP "is hereby ordered and directed to grant to any user making written application therefor a nonexclusive license to perform all of the compositions in the ASCAP repertory" (R. 32a); that ASCAP "shall, upon receipt of a written application for a license for the right of public performance of any, some or all of the compositions in the ASCAP repertory, advise the applicant in writing of the fee which it deems reasonable for the license requested"

[1] Page references prefixed by the symbol "R." refer to petitioners' appendix filed in the Court of Appeals for the Second Circuit, which is Volume I of the record herein.

(R. 34a-35a); and that if the parties are unable to agree upon a reasonable fee, the applicant may apply to the District Court to fix one (R. 35a).

On October 18, 1961, in anticipation of the expiration on December 31, 1961 of licenses then in effect between ASCAP and petitioners, petitioners applied to ASCAP for licenses to perform compositions in the ASCAP repertory on television programs produced by them (R. 50a). The licenses applied for differed in some respects from the licenses previously in effect between petitioners and ASCAP (R. 50a-56a). ASCAP refused to quote petitioners a fee for the type of license requested (R. 66a-84a).

On December 18, 1961 petitioners made an application to the District Court for the Southern District of New York "at the foot of the ASCAP final judgment" (R. 46a) to have the District Court fix a reasonable fee on the licenses applied for by petitioners (R. 43a-49a). Petitioners invoked the jurisdiction of the District Court pursuant to Rule 71 of the Federal Rules to enforce rights extended to them by the foregoing provisions of the March 14, 1950 amended consent decree.

The District Court held that the decree did not empower it to grant the type of license requested by petitioners (Appendix C, *infra*). On October 10, 1962 the District Court entered an order and judgment dismissing petitioners' application (R. 7a-11a).

Petitioners took appeals from the judgment of the District Court both to the Supreme Court and to the Court of Appeals for the Second Circuit.

On December 13, 1962, ASCAP moved this Court to dismiss the direct appeal taken by petitioners to this Court, on the ground that the Expediting Act did not confer jurisdiction on this Court to entertain petitioners' appeal, contending that:

> "The purpose of the Expediting Act is to expedite the final resolution of cases brought by the United States under certain statutes prohibiting conduct that threatens vital public interests. During consideration of the bill that became the Expediting Act, this objection was made clear by Senator Fairbanks, who explained the purpose of the bill on the Senate Floor when he reported it out of the Committee on the Judiciary:
>
> > 'The far-reaching importance of the cases arising under anti-trust laws now upon statute books or hereafter to be enacted, and the general public interest therein, are such that every reasonable means should be provided for speeding the litigation. It is the purpose of the bill to expedite litigation of great and general importance. It has no other object.' 36 Cong. Rec. (Part II) 1679 (1903).
>
> "If this appeal can be taken under the Expediting Act, ASCAP and any and all of its more than 30,000 licensees can appeal directly to this Court from any determination of a license fee or a form of license made by the District Court under the Amended Final Judgment. Review of any such determination would inevitably require detailed consideration of massive amounts of technical data pertaining to, for example, the amount, type and identity of music used by the licensee and its importance in the licensee's operations. The Expediting Act does not contemplate that the energies of this Court be expended on matters of such great technical com-

> plexity and of such limited public interest." (*Motion of Appellee ASCAP to Dismiss the Appeal or to Affirm*, December 13, 1962, pp. 6-7).

In the alternative, ASCAP moved to affirm the District Court's judgment on the merits.

On January 14, 1963 this Court, in a per curiam decision, dismissed petitioners' appeal "for want of jurisdiction" (371 U. S. 540). Mr. Justice Black was of the opinion that probable jurisdiction should be noted.

ASCAP then moved to dismiss the appeal pending before the Court of Appeals for the Second Circuit. This motion was granted by the Court of Appeals on May 7, 1963, which held that:

> "The judgment here sought to be appealed from was entered in 'a civil action brought in [a] district court of the United States' under the Sherman Act, 'wherein the United States is complainant.'"
>
> • • •
>
> "[E]ven if we were to share the view of one Justice that the Supreme Court has been hasty in dismissing the appeal—which we in no way intimate—we should still see no way for appellants to escape the controlling force of the Expediting Act in routing all appeals from final judgments to the Supreme Court and in forbidding appeals from any others." (Appendix B, *infra*, pp. B5, B10).

Reasons for Granting the Writ

1. The decision of the Court of Appeals for the Second Circuit, dismissing petitioners' appeal on the ground that the Expediting Act invested this Court with exclusive appellate jurisdiction, conflicts with and misconstrues the January 14, 1963 decision of this Court dismissing petitioners' attempt to take a direct appeal to this Court under the Expediting Act for want of jurisdiction. 28 U. S. C. §1291 requires the courts of appeals to take jurisdiction of appeals from all final decisions of the district courts, "except where a direct review may be had in the Supreme Court". The October 10, 1962 judgment of the District Court is a final judgment and would, except for the possibility of a direct appeal to this Court, be appealable to the Court of Appeals. Petitioners' attempted direct appeal to this Court having been dismissed for want of jurisdiction, the Court of Appeals erred in refusing to consider the appeal on its merits.

The Court of Appeals was not warranted in concluding, despite this Court's dismissal of petitioners' direct appeal for want of jurisdiction, that the Expediting Act deprived it of jurisdiction to hear petitioners' appeal. In no case has this Court construed the Expediting Act to preclude appeals to the courts of appeals from judgments in ancillary proceedings brought by non-parties to a Government antitrust suit for the limited purpose of enforcing rights accorded to them under the terms of the final judgment. The appeal here differs from that of a non-party seeking to intervene in order to vacate or amend the final judgment itself (e.g., *United States* v. *California Cooperative Canneries*, 279 U. S. 553; *Sam Fox Publishing Co.* v. *United States*, 366

U. S. 683; and *Missouri-Kansas Pipe Line Co.* v. *United States*, 312 U. S. 502), which is governed by the Expediting Act for the reason that allowing appeals in such cases to go to the courts of appeals would defeat the purpose of expediting the Government's main suit and would bring back opportunities for delaying a final adjudication that the Act was intended to avoid. *United States* v. *California Cooperative Canneries*, 279 U. S. 553, 558-59.

These considerations are inapplicable here. The present proceeding involves an essentially private controversy between petitioners and ASCAP. It was brought long after the entry of the final judgment in the Government antitrust suit, and pursuant to that judgment's express provisions, for the limited purpose of enforcing rights accorded to petitioners by the terms of that judgment. Thus, permitting the Court of Appeals to hear petitioners' appeal would not frustrate the purposes of the Expediting Act.

There is no warrant for the Court of Appeals' assumption that in dismissing petitioners' attempt to take a direct appeal under the Sherman Act, this Court must of necessity have passed on the merits of the case (Appendix B, *infra*, p. B10). The practice of this Court in dismissing appeals taken by persons seeking to intervene in pending actions, adverted to by the Court of Appeals, has no bearing on the present case. Denial of intervention, except where such intervention is one of right, is simply a refusal to permit the intervenor to join his independent claims with claims asserted by parties in the pending lawsuit. It leaves the intervenor free to assert his independent claims in a separate lawsuit. For this reason such an order can-

not be treated as a "final disposition" of the intervenor's claims. *Sam Fox Publishing Co. v. United States*, 366 U. S. 683, at pp. 694-95.

Petitioners are not would-be intervenors. As beneficiaries under the terms of the decree, they admittedly have standing to invoke the District Court's jurisdiction thereunder. They do not seek to intervene to assert independent rights under the antitrust laws. They seek to enforce their rights (pursuant to Rule 71) under the existing provisions of the decree itself. Since their claims are founded on the provisions of the decree, dismissal does not leave petitioners free to assert these claims in an independent lawsuit; and even if they proceeded by an independent suit under the antitrust laws, there is no basis for the assumption that such claims would be identical with, or measured by, their rights under the express provisions of the decree.

The inapplicability of intervention cases to the present type of proceeding was specifically recognized by ASCAP in its memorandum opposing petitioners' attempted direct appeal under the Expediting Act:

> "An order denying intervention to one entitled as a matter of right to intervene in a Government antitrust suit is wholly different from a license fee determination made by the District Court under the Amended Final Judgment. The granting of intervention in a Government antitrust suit makes the intervenor a party to the action itself, enabling him to present his views as to the merits of the claims and defenses or, if the action was or is to be resolved by consent, the form and adequacy of the relief to be embodied in the judgment. In contrast, the only right accorded to appellants and other

> ASCAP licensees under Section IX of the Amended Final Judgment is a judicial determination of a reasonable license fee. The exercise of that limited right does not involve the considerations of great public interest for which the Expediting Act was intended." (*Motion of Appellee ASCAP to Dismiss the Appeal or to Affirm*, pp. 7-8)

Furthermore, the decision of the District Court dismissing petitioners' application was based not on jurisdictional grounds but on the finding that the ASCAP decree did not entitle the petitioners to the particular relief sought.* If this Court had passed on the merits, it would have granted ASCAP's motion to affirm the District Court's decision rather than its motion to dismiss the appeal.

> "[I]t is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction. . . . If the court does later exercise its jurisdiction to determine that the allegations in the complaint do not state a ground for relief, then dismissal of the case would be on the merits, not for want of jurisdiction." (*Bell* v. *Hood*, 327 U. S. 678 at p. 682)

Even if petitioners were to be treated as intervenors, this Court, if it had passed on the merits of their claims and agreed with the District Court's interpretation of the ASCAP decree, would have affirmed that decision, not dismissed the appeal, for the reason that the decision appealed from involved a construction and application of the terms of the ASCAP decree. Compare *Allen Calcu-*

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* In fact, the District Court assumed jurisdiction and entered an order fixing interim fees and granting other relief to petitioners (R. 148a-150a).

lators, Inc. v. *National Cash Register Co.*, 322 U. S. 137 at pp. 142-43. The practice of this Court in such cases is exemplified by *Wometco Television and Theatre Co.* v. *United States*, 355 U. S. 40. There, a subsidiary of Loew's Inc., one of the defendants in *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131, applied to the district court under section III(7)(b) of a consent decree in that case (1952-3 CCH Trade Cases ¶67,228) for permission to acquire a theatre, upon a showing that such acquisition "will not unduly restrain competition." This permission was thereafter granted. Appellant Wometco, a competing theatre owner, sought, and was denied, leave to intervene in that proceeding. Wometco then took an appeal both from the order granting Loew's permission to acquire the theatre and from the order denying Wometco's intervention. This Court, faced not only with a nonreviewable order denying intervention but also with an appeal by Wometco from an order construing and applying the decree, signified its concurrence with the district court's rulings by affirming the decision below. The appeal in the present case involves an order construing and applying the provisions of the ASCAP consent decree, and would therefore be governed by the practice followed by this Court in cases such as *Wometco* if the Court had intended to confirm the District Court's decision on the merits.

2. This case presents an important question under the antitrust laws, which has not been, but should be, settled by this Court, i.e., whether non-party beneficiaries under an antitrust decree may appeal from a judgment dismissing their application for enforcement of decree provisions pur-

porting to grant them rights under the decree. There is continuing uncertainty as to whether or not petitioners in this type of ancillary proceeding have any right of appeal and, if so, whether their proper course is to go to the Supreme Court under the Expediting Act or to the Court of Appeals under 28 U. S. C. §1291. The history of the present case exemplifies this continuing uncertainty. Neither this Court's per curiam dismissal of petitioners' attempted direct appeal nor the Court of Appeals' later opinion resolves this question in a manner that will offer reliable guidance in future cases. The uncertainty is increased by the fact that the conclusions of the Second Circuit are in conflict with the views expressed by the Court of Appeals for the Third Circuit in *Magee-Hale Park-O-Meter Co.* v. *Vehicular Parking, Ltd.*, 180 F. 2d 897 at p. 900, which the Second Circuit expressly rejected (Appendix B, *infra*, p. B7).

Many antitrust decrees entered in recent years contain provisions allowing specified persons or classes of persons, not parties to the antitrust decree itself, to apply to the district court in which the decree was entered for enforcement of certain provisions thereof enacted for their benefit.* If such non-party beneficiaries cannot appeal an ad-

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* E.g., *United States* v. *Driver-Harris Co.*, 1961 CCH Trade Cases ¶70,031, sections V, VI (D. N. J. 1961); *United States* v. *New York Produce Exchange*, 1959 CCH Trade Cases ¶69,395, section IV (S. D. N. Y. 1959); *United States* v. *Robertshaw-Fulton Controls Co.*, 1957 CCH Trade Cases ¶68,592, section V (W. D. Pa. 1957); *United States* v. *Crown Zellerbach Corp.*, 1956 CCH Trade Cases ¶68,544, section VIII (N. D. Ill. 1956); *United States* v. *International Cigar Machinery Co.*, 1956 CCH Trade Cases ¶68,426,

(Continued on page 14)

verse decision of the district court in an ancillary proceeding, the beneficial effect of the many antitrust decrees granting such rights would seriously diminish. Another undesirable result would be to burden the Attorney General with the task of deciding whether or not to take appeals on behalf of petitioners aggrieved by decisions of the district courts in such proceedings, matters of concern only to the persons directly involved. The question whether such non-party beneficiaries have a right to appeal from

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(Continued from page 13)

section IV (S. D. N. Y. 1956); *United States* v. *Michigan Tool Co.*, 1956 CCH Trade Cases ¶68,290, section V (E. D. Mich. 1956); *United States* v. *Logan Co.*, 1956 CCH Trade Cases ¶68,375, section V (W. D. Pa. 1956); *United States* v. *General Shoe Corp.*, 1956 CCH Trade Cases ¶68,271, section VIII (M. D. Tenn. 1956); *United States* v. *American Linen Supply Co.*, 1956 CCH Trade Cases ¶68,542, section VIII (N. D. Ill. 1956); *United States* v. *General Railway Signal Co.*, 1955 CCH Trade Cases ¶67,992, section IX (W. D. N. Y. 1955); *United States* v. *Magcobar, Inc.*, 1955 CCH Trade Cases ¶68,023, section IV (S. D. Cal. 1955); *United States* v. *Eastman Kodak Co.*, 1954 CCH Trade Cases ¶67,920, section VI (W. D. N. Y. 1954); *United States* v. *Servel, Inc.*, 1954 CCH Trade Cases ¶67,665, section IV (E. D. Pa. 1954); *United States* v. *Cincinnati Milling Machine Co.*, 1954 CCH Trade Cases ¶67,733, section V (E. D. Mich. 1954); *United States* v. *Pittsburgh Crushed Steel*, 1954 CCH Trade Cases ¶67,892, section XIII (N. D. Ohio 1954); *United States* v. *Food Machinery and Chemical Corp.*, 1954 CCH Trade Cases ¶67,829, sections IV, V (N. D. Cal. 1954); *United States* v. *Hunter Douglas Corp.*, 1954 CCH Trade Cases ¶67,802, section V (S. D. Cal. 1954); *United States* v. *Bendix Aviation Corp.*, 1952-53 CCH Trade Cases ¶67,591, section V (S. D. N. Y. 1953); *United States* v. *Telescope Carts, Inc.*, 1953 CCH Trade Cases ¶67,573, section IV (W. D. Mo., 1953); *United States* v. *Bearing Distributors Co.*, 1953 CCH Trade Cases ¶67,595, section IV (W. D Mo. 1953); *United States* v. *Automatic Sprinkler Co. of America*, 1948-49 CCH Trade Cases ¶62,230, section IV (N. D. Ill. 1948); *United States* v. *White Cap. Co.*, 1948-49 CCH Trade Cases ¶62,268, section V (N. D. Ill., 1948).

adverse decisions of the district court in proceedings brought by them to enforce their rights under a decree is, therefore, of vital concern to the administration of the anti-trust laws.

The Court of Appeals suggested that one possible interpretation of the Supreme Court's dismissal of petitioners' direct appeal to the Supreme Court was that petitioners, not being parties to the ASCAP consent decree, have no standing to take an appeal from a decision under that decree (Appendix B, *infra*, p. B10). However, Rule 71 of the Federal Rules expressly provides that where an order is made in favor of a person who is not a party to the action, he may enforce obedience to the order by the same process as if he were a party. Since a final order in an enforcement proceeding brought by a party to the decree would obviously be appealable by the losing side, no reason appears why a different result should obtain in the case of a final order in a proceeding under Rule 71. In other contexts it is now well-established that the right, by means of an ancillary proceeding, to obtain a construction and enforcement of the provisions of a decree previously entered by the court is not confined to the original parties to the action. *St. Louis-San Francisco R. Co.* v. *Byrnes*, 24 F. 2d 66 at pp. 70-71 (8th Cir.); *Cincinnati, I & W. R. Co.* v. *Indianapolis Union Ry. Co.*, 279 Fed. 356 (6th Cir.) at pp. 362-63. Even though not a party to the original action at the time of the final decree, the petitioner in such a proceeding has a right to appeal from an adverse decision of the district court. See, e.g., *Blossom* v. *Milwaukee Railroad Co.*, 1 Wall. 655; *St. Louis-San Francisco R. Co.* v. *Byrnes*, 24 F. 2d 66 (8th Cir.). No reason appears why a

contrary rule should apply in ancillary proceedings brought to enforce rights accorded to non-parties by the terms of a final decree in an antitrust suit.

A bill has recently been introduced in Congress to amend the provisions of the Expediting Act so as to give the courts of appeals appellate jurisdiction in most types of Government antitrust suits (88th Cong., 1st Sess., S. 1892). This bill does not bear on the status of non-party beneficiaries under final judgments in antitrust decrees, and would not resolve the question presented here.*

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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* If this petition is granted we will urge that the following additional question, concerning the merits of petitioners' appeal, be passed upon.

1. Whether petitioners are entitled under the ASCAP consent decree to the licenses requested by them and to have the District Court fix a reasonable fee therefor.

This question is not urged as a reason for granting the writ because it was not reached by the Court of Appeals.

APPENDIX A

Names of Petitioners for Writ of Certiorari

The A. S. Abell Co.; Abilene Radio & Television Co.; Aladdin Broadcasting Corp.; Alvarado Television Co., Inc.; Appalachian Broadcasting Corp.; Arizona Television Co.; Arkansas Radio & Equipment Co.; Arkansas Television Co.; Atlanta Newspapers, Inc.; Bakersville Broadcasting Co.; Beaumont Television Corp.; Bell Publishing Co.; A. H. Belo Corp.; Binghamton Press Company, Inc.; Biscayne Television Corporation; Bi-States Co.; Black Canon Broadcasting Co., Inc.; Black Hawk Broadcasting Co.; The Board of Curators of the University of Missouri; Brazos Broadcasting Co.; Broadcasting Co. of the South; The Brockway Company; California Northwest Broadcasting Co.; Capitol Broadcasting Co.; Capital Cities Broadcasting Co.; Carolina Broadcasting Co.; Carolina Broadcasting System, Inc.; Central Broadcasting Co.; Central Minnesota Television Co.; Central Plains Enterprises, Inc.; Central-South Sales Co.; Cherry Broadcasting Co.; Chronicle Publishing Co.; City of St. Petersburg, Fla.; Columbia Empire Broacasting Co.; Columbia Pictures Electronics Co., Inc.; Columbus Broadcasting Co., Inc.; Cook Broadcasting Co.; Cornhusker Television Corp.; Cowles Magazine & Broadcasting, Inc.; Crosley Broadcasting Corp.; Crosley Broadcasting of Atlanta, Inc.; Dickinson Radio Association; The Dispatch Printing Co.; Duhamel Enterprises, Inc.; El Mundo, Inc.; Eugene Television, Inc.; Evansville Television, Inc.; The Evening News Association; The Evening Star Broadcasting Co.; Express

Publishing Company; Fetzer Broadcasting Co.; Fetzer Television, Inc.; Fisher Broadcasting Company; Fisher's Blend Station, Inc.; Forest Capital Broadcasting Co.; Fort Meyers Broadcasting Co.; Frontier Broadcasting Co.; Georgia-Carolina Broadcasting Co.; Garryowen Butte Tv, Inc.; General Electric Co.; Glendive Broadcasting Corporation; Globe News Publishing Co.; The Goodwill Stations, Inc.; Greater Rockford Television Inc.; Great Lakes Television Co.; Great Western Broadcasting Corp.; Greensboro News Co.; Gulf Television Corp.; Guy Gannett Broadcasting Services; Harbenito Broadcasting Company; Hawaiian Broadcasting System, Limited; The Hearst Corp.; Herald Corp.; Herald Publishing Co., Inc.; Hirsch Broadcasting Co.; Houston Consolidated Television Co.; Houston Post Co.; Independent Broadcasting Co.; Indiana Broadcasting Corp.; Iowa State University; Jefferson Standard Broadcasting Co.; The Journal Co.; KCMC, Inc.; KCOP Television Inc.; KCRA, Inc.; KDAL, Inc.; KELP Television Corp.; Kentuckiana Television, Inc.; Kern County Broadcasting Co.; Key Television Inc.; KFBB Broadcasting Corp.; KGUN-TV, Inc.; KHQ, Incorporated; King Broadcasting, d/b/a Pioneer Broadcasting Company; KOGO Broadcasting Corp.; KOOL Radio-Television, Inc.; KOTV, Inc.; KREM Broadcasting Company; K-SIX Television, Inc.; KSLA-TV, Inc.; KSOO-Tv, Inc.; KTAR Broadcasting Co.; KTBS, Inc.; KTIV Television Co.; KTVB, Inc.; KTVE, Inc.; KUTV, Inc.; KWTX Broadcasting Co.; Lamar Life Broadcasting Co.; Las Vegas Television, Inc.; Lee Broadcasting, Inc.; Lee Radio, Inc.; Liberty Television Inc.; Louisiana Television Broadcasting Corp.; Loyola Uni-

versity; Lynchburg Broadcasting Corp.; McClatchy Broadcasting Co.; M & M Broadcasting Co.; Maine Radio & Television Co.; Marietta Broadcasting, Inc.; Martin Theatres of Georgia, Inc.; May Broadcasting Co.; Meredith Broadcasting Co.; Meredith Syracuse TV Corp.; Meredith WOW, Inc.; Metromedia, Inc.; Metropolitan Broadcasting Corp.; Metropolitan Broadcasting Corp. of California; Metropolitan Television Co.; Meyer Broadcasting Co.; Miami Valley Broadcasting Corp.; Michiana Telecasting Corp.; Midcontinent Broadcasting Co.; Midcontinent Broadcasting Co. of Wisconsin, Inc.; Mid-Continent Telecasting, Inc.; Midland Empire Broadcasting Co.; Mid-Florida Television Corp.; Mid-New York Broadcasting Corp.; Midwestern Broadcasting Company; Midwest Radio-TV, Inc.; Mission Telecasting Corp.; Modern Broadcasting Co. of Baton Rouge, Inc.; The Montana Network; Mountain City TV, Inc.; Mt. Hood Radio & Television Broadcasting Corp.; Mt. Mansfield Television, Inc.; Mt. Washington TV, Inc.; Nafi Telecasting, Inc.; New Mexico Broadcasting Co., Inc.; Newhouse Broadcasting Corp.; New Orleans Television Corp.; Noe Enterprises, Inc.; North Carolina Television, Inc.; North Central Broadcasting Co.; North Dakota Broadcasting Co., Inc.; Northeastern Penn. Broadcasting, Inc.; Northwest TV Co.; Oklahoma Quality Broadcasting Company; Oklahoma Television Corporation; Oregon Television, Inc.; The Outlet Company; Paducah Newspaper, Inc.; Palmetto Radio Corporation; Pembina Broadcasting Co.; Peninsula Broadcasting Corp.; Peoples Broadcasting Corp.; Petersburg Television Corp.; John H. Phipps Stations; Pikes Peak

Broadcasting Co.; Plains Television Corporation; Pulitzer Publishing Co.; Queen City Broadcasting Co.; Quincy Broadcasting Company; Radio Service Corp. of Utah; Redwood Broadcasting Co., Inc.; Reeves Broadcasting & Development Corp.; Richmond Television; RKO General, Inc.; Rocket City Television, Inc.; Rock Island Broadcasting Co.; Rollins Telecasting Inc.; Sarkes Tarzian, Inc.; Savannah Broadcasting Company, Inc.; Scranton Broadcasters, Inc.; Scripps-Howard Broadcasting Company; Scripps-Howard Radio, Inc.; Shasta Telecasting Corp.; Shenandoah Life Stations, Inc.; Shenandoah Valley Broadcasting, Inc.; Snyder & Associates; South Bend Tribune Newspaper; South Central Broadcasting Corp.; Southeastern Broadcasting Co.; Southeastern Ohio Television System; Southern Minnesota Broadcasting Co.; Southern Oregon Broadcasting Co.; Southern Television Corp.; Southland Industries, Inc.; South Mississippi Television Co.; Spartan Radiocasting Co.; Springfield Television Broadcasting Corp.; Standard Electronics Corp.; Standard Radio & Television Co.; Star Broadcasting Co., Inc.; Storer Broadcasting Co.; Summit Radio Corp.; Susquehanna Broadcasting Co.; Taft Broadcasting Co.; Television Broadcasters, Inc.; Television City, Inc.; Television Company of America, Inc.; Television Corp. of Michigan, Inc.; Television Muscle Shoals, Inc.; Television Wisconsin, Inc.; Texas Goldcoast Television, Inc.; Texas Telecasting, Inc.; Texoma Broadcasters, Inc.; Robert R. Thomas, Jr.; Tidewater Teleradio, Inc.; Time-Life Broadcast, Inc.; Times-Mirror Broadcasting Company; Times-World Corp.; Topeka Broadcasting Assoc., Inc.; Transcontinent

Television Corp.; The Travelers Broadcasting Service Corp.; Triangle Broadcasting Corp.; The Tribune Co.; Tribune Publishing Co.; Tri-Cities Broadcasting Company; Tri-City Broadcasting Co.; Tri-City Radio Corp.; Triple City Broadcasting Co.; Tri-State Broadcasting Co., Inc.; Truth Publishing Co., Inc.; Tulsa Broadcasting Co.; Turner-Farrar Association; TV Colorado, Inc.; Tv Denver, Inc.; Twin State Broadcasting, Inc.; Valley Telecasting Co.; Veterans Broadcasting Co., Inc.; Vindicator Printing Co.; Voice of the Caverns, Inc.; Wabash Valley Broadcasting Corp.; The Washington Post Co.; WATE, Inc.; WAVE, Inc.; WBEN, Inc.; WBRE-TV, Inc.; WCSC, Inc.; WDAY, Inc.; WDEF Broadcasting Co.; WDSM TV Co.; WDSU Broadcasting Corp.; WEHT, Inc.; West Central Broadcasting Co.; Western Slope Broadcasting Co., Inc.; Westex Television Co.; Westinghouse Broadcasting Co., Inc.; WFIE, Inc.; WGAL, Inc.; WGN, Inc.; WHAS, Inc.; WHEC, Inc.; WHP, Inc.; Wichita Television Corporation, Inc.; Wichtex Radio & Televis on Corp.; WIIC, Inc.; Winnebago Television Corporation; Wisconsin Valley Television Corp.; WISE-TV, Inc.; WJAC, Inc.; WJHL, Inc.; WKBH Television, Inc.; WKBN Broadcasting Corp.; WKJG, Inc.; WKRG-TV, Inc.; WKST, Inc.; WKY Television System, Inc.; WLAC-TV, Inc.; WLBZ Television, Inc.; WLOK, Inc.; WMC Broadcastng Co.; WMRC, Inc.; WMT-TV, Inc.; Wometco Enterprises, Inc.; WOOD Broadcasting, Inc.; WPIT, Inc.; WPIX, Inc.; WSAV, Inc.; WSM, Inc.; WSTV, Inc.; WTAR Radio-TV Corp.; WTRF-TV, Inc.; WTWV, Inc.; Zanesville Publishing Company.

APPENDIX B

Opinion of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Cal. No. 317—October Term, 1962

Argued April 10, 1963 Decided May 7, 1963.

Docket No. 28086

UNITED STATES OF AMERICA,

Plaintiff,

v.

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS,

Defendant-Appellee.

In the Matter of the Application

of

SHENANDOAH VALLEY BROADCASTING, INC., et al.,

Petitioners-Appellants,

For the Determination of Reasonable License Fees.

Before:

MOORE, FRIENDLY and HAYS, *Circuit Judges.*

Appeal by television stations from a judgment of the District Court for the Southern District of New York, Sylvester J. Ryan, Chief Judge, dismissing their application for a determination of reasonable fees for certain licenses sought from defendant pursuant to a consent de-

cree in a suit brought against defendant by the United States under the anti-trust laws. Dismissed for want of appellate jurisdiction.

WALTER R. MANSFIELD (Donovan, Leisure, Newton & Irvine, New York, N. Y.), (Ralstone R. Irvine and Helmut F. Furth of Counsel), *for Petitioners-Appellants.*

ARTHUR H. DEAN, New York, N. Y., (William Piel, Jr., Herman Finkelstein, Attorneys for Respondent-Appellee; Lloyd N. Cutler (Wilmer, Cutler & Pickering), Washington, D. C., and Frederick A. Terry, Jr. (Sullivan & Cromwell), New York, N. Y., of Counsel), *for Respondent-Appellee.*

JOEL E. HOFFMAN (Lee Loevinger, Assistant Attorney General, Robert B. Hummel, Attorney), *for the United States of America.*

FRIENDLY, *Circuit Judge*:

On March 14, 1950, the District Court for the Southern District of New York entered an amended consent decree in an action brought by the United States against the American Society of Composers, Authors and Publishers (ASCAP) under the Sherman Act.[1] The decree provided, *inter alia*, that ASCAP must "grant to any user making written application therefor an non-exclusive license to perorm all of the compositions in the ASCAP repertory," and

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[1] The suit was brought in 1941 and the original consent decree was entered that year. The nature and history of the litigation are sketched in *Sam Fox Publishing Co.* v. *United States*, 366 U. S. 683 (1961).

that "ASCAP shall, upon receipt of a written application for a license for the right of public performance of any, some or all of the compositions in the ASCAP repertory, advise the applicant in writing of the fee which it deems reasonable for the license requested." If the parties were unable to agree upon a reasonable fee, the applicant might move the District Court to fix one. ASCAP was bound to notify the Attorney General of any such motion, and had the burden "to establish the reasonableness of the fee requested by it."

Pursuant to these provisions, television stations have had a choice between two types of licenses to use ASCAP music on all their local (i.e., non-network) programs—a "blanket" license, under which they pay a fee based on the revenues from the entire group of programs covered by the license, and a "per-program" license, under which the fee is based only on revenues from those programs which actually use ASCAP music. In the fall of 1961 Shenandoah Valley Broadcasting, Inc., and the owners and operators of 363 other television stations applied to ASCAP for a new type of license that would cover only programs produced by them and would exclude not only network programs (which had always been excluded) but also prerecorded program material furnished by independent film producers—who would thus be obliged to make their own arrangements with ASCAP. ASCAP took the position that it was not obliged to grant this new form of license. After proceedings in the District Court, all conducted under the title of the original anti-trust suit, Chief Judge Ryan concluded that the amended consent decree did not give the applicants a right to the type of license requested, that the relief sought by them could be had only by an amendment of the decree "after hearings on a petition for such relief

by a party to the suit," and that they were not parties to the suit.

On October 10, 1962, judgment dismissing the application was entered; on December 7, 1962, applicants filed notices of appeal both to the Supreme Court, apparently pursuant to §2 of the Expediting Act, 32 Stat. 823 (1903), as amended, 15 U. S. C. §29, 49 U. S. C. §45, and to this Court. ASCAP promptly moved the Supreme Court to dismiss or affirm; the motion did not assert that the appeal should properly have been taken here.[2] On January 14, 1963, the Supreme Court entered a *per curiam* memorandum, 371 U. S. 540, reading:

> "The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction.
>
> MR. JUSTICE BLACK is of the opinion that probable jurisdiction should be noted."

Two months later ASCAP moved to dismiss the appeal to this Court for want of appellate jurisdiction; we directed that the motion be argued along with the merits. The United States, taking no position on the merits, supported the motion to dismiss. We think the motion must be granted.

Section 2 of the Expediting Act provides that "In every civil action brought in any district court of the United States" under the Sherman Act "or any other Acts having

---

[2] Appellee did argue to the Supreme Court that "If this appeal can be taken under the Expediting Act, ASCAP and any and all of its more than 30,000 licensees can appeal directly to this Court from any determination of a license fee or a form of license made by the District Court under the Amended Final Judgment," and that "The Expediting Act does not contemplate that the energies of this Court be expended on matters of such great technical complexity and of such limited public interest," but this is hardly an argument for review in a court of appeals.

a like purpose • • •, wherein the United States is complainant, an appeal from the final judgment of the district court will lie only to the Supreme Court." 49 U. S. C. §45. The judgment here sought to be appealed from was entered in "a civil action brought in [a] district court of the United States" under the Sherman Act "wherein the United States is complainant." There would be no profit to appellants in an argument that the judgment dismissing their motion to fix license fees was not a "final judgment of the district court." For our own jurisdiction under 28 U. S. C. §1291 is limited to "appeals from all final decisions of the district courts of the United States"; the Supreme Court has indicated, as we should have assumed in any event, that the standard of finality under the two statutes is the same, *Brown Shoe Co.* v. *United States*, 370 U. S. 294, 306-309 (1962), so that if the judgment is not sufficiently "final" to warrant an appeal to the Supreme Court, it equally does not qualify under 28 U. S. C. §1291; and the appeal is within none of the exceptions to the rule of finality provided in 28 U. S. C. §1292. Moreover, the Expediting Act has been authoritatively construed not only to route appeals from all final judgments directly to the Supreme Court[3] but to forbid interlocutory appeals. In *United States* v. *California Co.-op Canneries, Inc.*, 279 U. S. 553, 558 (1929), after summarizing the "previous

[3] The "final judgment[s]" appealable to the Supreme Court under the Expediting Act are not limited to the principal judgment awarding or denying relief; they include certain orders prior to such a judgment, *e.g.*, orders denying applications for intervention as of right, *Missouri-Kansas Pipe Line Co.* v. *United States*, 312 U. S. 502 (1941), and certain orders subsequent to such a judgment. See *Aluminum Co.* v. *United States*, 302 U. S. 230 (1937); and particularly *Terminal R.R. Ass'n* v. *United States*, 266 U. S. 17 (1924), involving an application by certain parties "to enforce rights claimed by them under the original decree."

opportunities for delay" incident to appeal first to the Court of Appeals and then to the Supreme Court—the mischief at which the Expediting Act was aimed, Mr. Justice Brandeis said:

> Thus, Congress limited the right of review to an appeal from the decree which disposed of all matters * * * and it precluded the possibility of an appeal to either court from an interlocutory decree."

Later, *United States Alkali Export Ass'n* v. *United States*, 325 U. S. 196, 201-02 (1945), and *De Beers Consolidated Mines, Ltd.* v. *United States*, 325 U. S. 212, 217 (1945), held that interlocutory orders of the district court in suits subject to the Expediting Act can be reached by extraordinary writs under 28 U. S. C. §1651 issued by the Supreme Court, where "sole appellate jurisdiction lies," 325 U. S. at 202—even when, as in the *De Beers* case, the order was a preliminary injunction ordinarily reviewable by a court of appeals under 28 U. S. C. §1292(a)(1). See also Hart & Wechsler, The Federal Courts and the Federal System (1953), at 1372.

Neither are appellants assisted by the two court of appeals decisions on which they rely. Our own decision in *United States* v. *St. Regis Paper Co.*, 285 F. 2d 607, 609-11 (2 Cir. 1960), aff'd, 368 U. S. 208 (1961), is inapposite. That was a suit by the United States under §9 of the Federal Trade Commission Act, 15 U. S. C. §49, for a mandatory injunction commanding a corporation to furnish reports to the Commission under §6(b) of the Act, and for assessment of the penalties provided in §10 for failure to do that. We held that although the Federal Trade Commission Act was an act "having a like purpose" to the Sherman Act, it would be unreasonable to read the

Expediting Act "to require a clear path from the district court to the Supreme Court of the United States" in an action that was merely a part of the investigatory stages preliminary to a Commission proceeding, any final order in which would be directly reviewable only in a court of appeals. The other case is *Magee-Hale Park-O-Meter Co.* v. *Vehicular Parking, Limited*, 180 F. 2d 897, 900 (3 Cir. 1950). There a Government anti-trust suit against Vehicular Parking had resulted in a district court decree, comparable to the one here, requiring the defendant to license its patents for reasonable royalties; subsequently, Magee-Hale had intervened in that suit and moved for summary judgment declaring the patents invalid. Meanwhile, Magee-Hale brought a separate action against Vehicular Parking seeking a judgment declaring the same patents invalid, and the Court of Appeals affirmed the dismissal of this action on the ground that the issue could be determined in the pending anti-trust suit. In the course of its opinion, the court of appeals said that if the district court, having denied or dismissed the motion for summary judgment, proceeded to fix reasonable royalties to be paid by Magee-Hale under the compulsory-licensing provision of the decree, "An appeal from such an order, if taken by Magee-Hale, will search the record and give to this court jurisdiction to test the validity of the order denying or dismissing Magee-Hale's motion for a summary judgment declaring the patents invalid." It is wholly unrealistic to take this remark as a considered determination that, despite the plainly contrary implications of *Terminal R. R. Ass'n* v. *United States*, 266 U. S. 17, 28 (1924), such an appeal would lie to the court of appeals rather than to the Supreme Court. Prompted by a question from the bench, counsel for ASCAP have fur-

nished us with copies of the briefs in Magee-Hale; they reveal no discussion of that issue, which, indeed, was hardly relevant. As our own experience has shown, *United States* v. *New York, N. H. & H. R. R.*, 276 F. 2d 525, 537 (2 Cir.), cert. denied, 362 U. S. 961 (1960), it is all too easy for a court of appeals, which exercises general appellate authority over final decisions of district courts, to forget, unless reminded by counsel, that a few such appeals are not its business. When an issue as to its role in appeals under the Expediting Act has been squarely presented, the Third Circuit has made its position plain. *Missouri-Kansas Pipe Line Co.* v. *United States*, 108 F. 2d 614 (3 Cir. 1939), cert. denied, 309 U. S. 687 (1940). Appellants' reliance on the statement in *Magee-Hale* is thus answered *a fortiori* by what Chief Justice Marshall said long ago: "No question was made, in that case, as to the jurisdiction. It passed *sub silentio*, and the Court does not consider itself as bound by that case." *United States* v. *More*, 3 Cranch. (7 U. S.) 159, 172 (1805).

Appellants' main contention is that since, as they assert, their appeal is in fact from a "final judgment," the Supreme Court's dismissal "for want of jurisdiction" must be taken to mean that it was not within the Expediting Act, thereby permitting an appeal to this Court. They contend that there is no other rational explanation of the Supreme Court's action. Appellee and the United States find such an explanation in an analogy to the rule that appeals from orders denying merely permissive intervention will not be entertained. *City of New York* v. *Consolidated Gas Co.*, 253 U. S. 219 (1920); *Allen Calculators, Inc.* v. *National Cash Register Co.*, 322 U. S. 137 (1951); *Sam Fox Publishing Co., Inc.* v. *United States*, 366 U. S. 683 (1961). Appellants reply that since the consent decree

expressly gave them, as music users, the right to invoke the district court's jurisdiction by applying for a license, they come within F. R. Civ. Proc. 71, providing that "When an order is made in favor of a person who is not a party to the action, he may enforce obedience to the order by the same process as if he were a party;" hence, they say, insofar as the intervention cases are relevant, the controlling principle is the one sustaining appealability where a court has denied intervention to a party entitled to intervene as of right. *Missouri-Kansas Pipe Line Co.* v. *United States*, 312 U. S. 502 (1941); see *Sutphen Estates, Inc.* v. *United States*, 342 U. S. 19, 20 (1951).

Continuing the dialogue, appellee and the United States counter that the case is indeed like permissive intervention in the important respect "that a person whose private interests coincide with the public interest in government antitrust litigation is nonetheless not bound by the eventuality of such litigation, and hence may not, as of right, intervene in it." *Sam Fox Publishing Co.* v. *United States*, *supra*, 366 U. S. at 689. In such cases, it has been said that even though the denial of intervention effectively ends any opportunity for the would-be intervenor to assert his claim in the pending suit, it is not sufficiently "final" to be appealable because it leaves him free to seek the same relief in an independent action. *Cresta Blanca Wine Co.* v. *Eastern Wine Corp.*, 143 F. 2d 1012, 1015 (2 Cir. 1944); *Cameron* v. *President and Fellows*, 157 F. 2d 993, 997 (1 Cir. 1946).[4] Accordingly, the Supreme Court could well have regarded the judgment here as not final and thus as analogous to the

[4] This rationale does not seem wholly consistent with other statements that orders denying what was sought merely as permissive intervention may be appealable if an abuse of discretion. See 4 Moore, Federal Practice (1962), 102, and cases cited in fn. 2.

permissive intervention cases, on the basis that if the consent decree did not entitle appellants to the type of license requested, they were non-parties seeking a modification of the decree, whereas even if it did so entitle them, they are still free to assert their rights in an independent private anti-trust suit against ASCAP. To this appellants respond that since they *claimed* relief under the decree as a matter of right, denial of their claim would have led to affirmance of the district court's judgment rather than to dismissal for want of jurisdiction. As a matter of strict logic, the argument has a certain attractiveness. See *Cameron* v. *President and Fellows, supra,* 157 F. 2d at 997. But it ignores that in this area the issue of appealability has tended to fuse with the merits of the claim to be heard. See *Sam Fox Publishing Co., supra,* 366 U. S. at 687. Thus, even when a person appealing from the denial of his motion to intervene claims he was entitled to intervention not merely permissively but as of right, the Supreme Court, upon determining he was not entitled to intervene as of right, customarily will dismiss the appeal. *Allen Calculators, Inc.* v. *National Cash Register Co., supra; Sutphen Estates, Inc.* v. *United States, supra; Sam Fox Publishing Co.* v. *United States, supra.* Compare *Farmland Irrigation Co.* v. *Dopplmaier,* 220 F. 2d 247 (9 Cir. 1955). We cannot escape the conclusion that this, in effect, is what happened here. But even if we thought otherwise, and even if we were to share the view of one Justice that the Supreme Court had been hasty in dismissing the appeal—which we in no way intimate—we should still see no way for appellants to escape the controlling force of the Expediting Act in routing all appeals from final judgments to the Supreme Court and in forbidding appeals from any others.

Appeal dismissed.

Judgment of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the seventh day of May one thousand nine hundred and sixty-three.

Present:

HON. LEONARD P. MOORE,
HON. HENRY J. FRIENDLY,
HON. PAUL R. HAYS,
Circuit Judges.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS,

Defendant-Appellee,

SHENANDOAH VALLEY BROADCASTING, INC., et al.,

Petitioners-Appellants.

Judgment of Court of Appeals

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the appeal from the judgment of said District Court be and it hereby is dismissed.

A. DANIEL FUSARO
Clerk

United States Court of Appeals
Second Circuit
Filed May 7 1963
A. Daniel Fusaro, Clerk

APPENDIX C

Opinion of District Court

[Caption Omitted]

OPINION

RYAN, *J.*

This petition, filed by more than 335 local television stations situated throughout the United States, seeks fixation of a reasonable royalty for a license under Section IX(A) and (B) of the Amended Consent Judgment, entered on March 14, 1950 in the antitrust suit entitled *United States* v. *ASCAP*. While theoretically the petition is brought under the provisions of the decree for the fixing of fees, what it really seeks from ASCAP is a radically different license from that under which petitioners have been operating under the decree for the past twelve years and only secondly the fixing of a reasonable fee for such license.

The type of license sought is neither the blanket nor per program license described in the judgment. Petitioners would have a composite sort of license, containing a little bit of both, which would grant them the right to use any, some or all of the compositions of ASCAP's repertory on all their locally-originated broadcasts, while excluding from such license music performing rights for network programs and prerecorded material produced after February 28, 1962 by persons other than petitioners; as to those, petitioners would demand that the rights be secured, cleared and paid for at the source.

Petitioners made written application to ASCAP for such license and upon ASCAP's refusal to issue such license, they filed the petition now before us.

Opinion of District Court

The underlying and immediate question raised by this petition is the court's power under the decree to compel ASCAP to issue such license; until that is determined the question of a fee under such license is not reached.

It is petitioners' position that the power to fix reasonable fees encompasses the power to fix a type of license which the court finds to be reasonable; that this construction of the decree is justified by the objectives and purposes of the judgment and that consequently no amendment to the decree is necessary in order to grant the application.

The government is in accord with petitioners on the principle that if the court finds the type of license requested to be reasonable, it has the power to compel its issuance; it, however, expresses no opinion on the reasonableness of the license. And it is ASCAP's position that, apart from the express prohibitions and restrictions as to the types of licenses it may not force on an applicant and the affirmative duty it has to offer upon request by an applicant a choice of the types of license enumerated in the judgment, it is free to negotiate with an applicant for a particular kind of license on particular terms, and that, therefore, the court lacks power to direct the issuance of the license sought, irrespective of its reasonableness (which it strenuously disputes).

We agree with the position taken by ASCAP, for the mere fact that a particular license requested may be more reasonable than that which has been given in the past, does not impose upon ASCAP the duty to grant such license,

nor does it give the court additional powers not contained in the amended judgment.

Until 1949 ASCAP had granted royalty-free licenses to all television stations for the use of its repertory; this was in an endeavor to assist the stations and to enable the industry to gain stability. In 1948 ASCAP suggested that the television industry negotiate with it for television licenses. Local and network blanket television licensing agreements were made in 1949, 1954 and 1958; substantially the same provisions were contained in each agreement. The petitioners, all local stations, have operated and continue to operate under a local blanket license granting them the right to play the entire repertory of ASCAP on all locally-originated programs. For this license they pay a fee which is based on a percentage of their "net receipts from sponsors", excluding any transcribed programs which ASCAP licenses at the source. Petitioners, dissatisfied with this type of license, would have the court cast the burden of paying for the performance rights on the pre-recorded programs on the producers rather than on petitioners; a right and option which the producers now have under their decree and which ASCAP is compelled to grant them. ¶ V-B

Nowhere in the judgment is there any provision explicitly or impliedly requiring ASCAP to issue the type of license requested, and petitioners do not so urge. They do argue, however, that the granting of such license would further the objectives of the judgment as a whole whereas a denial would frustrate them, and that looking beyond the

exact wording of the decree, as a court of equity must, the power of this court to compel the issuance of the license sought is clear.

More specifically, petitioners in support of their application point to Sections VI and IX as giving this court "broad equitable powers" to grant the type of license they seek.

Section VI provides for the granting of a non-exclusive license to perform "all of the compositions in the ASCAP repertory." While this provision standing alone might lend itself to an interpretation that "all" could encompass a direction to grant licenses on "any or some" as desired by an applicant, when read with the sentence following it and with the other provisions of the judgment, particularly Section VII (B) and (C), it is clear that "all" refers to a license to include the entire repertory as distinguished from the other type of license which is limited to one or more specified compositions. The balance of this Section VI deals with just such a license.

The entire Section IX, which speaks of a fee for the "license requested" following application for a license on "any, some or all" of the compositions, deals with the procedure for determining reasonable license fees, not types of licenses. The words "license requested" do not mean that an applicant for a license is given the right under the decree to compel ASCAP to give any type of license it demands and have this court fix the fee. Each section of the Amended Judgment must be read and interpreted in the light of the entire judgment. (*Swift & Co.* v. *United*

States, 276 U. S. 311, 48 S. Ct. 311, 72 L. Ed. 587 (1928).) The words "license requested" do not remove the limitations as to the extent, type and nature of licenses found in the other provisions of the judgment.

In Section IV (E), ASCAP is restrained from negotiating with any motion picture theatre exhibitor for a license to exhibit movies that use its compositions. This section makes no mention of television broadcasters, who are in many respects similarly situated to the theatre exhibitors. It is plain that the television broadcasters were not intended to be included within the prohibitions of Section IV (E).

Section VII deals primarily with the computation of fees for radio and television broadcasting. Section VII (B) provides that ASCAP must issue per-program licenses, on written request, and that the stations be given an economic choice between per-program and blanket licenses—there its obligation ends. There is no mention made of any type of license other than per-program or blanket. Section VIII refers to "the various types of licenses", clearly a reference to Section VII (B) and the licenses there described, the economic choice between per-program and blanket licenses, and the fees therefor, and again no other type license is mentioned.

Petitioners urge that the type of license they seek would give greater effect to provisions of the Amended Judgment, which, they argue, is rendered ineffectual by the present type of broadcasting licenses. If this be so (and we make no finding either way), relief could only be

had by a reappraisal of the Amended Judgment to determine if a further amendment were warranted; this only after hearings on a petition filed for such relief by a party to the suit.

Petitioners were not parties to the judgment; they have petitioner only as beneficiaries under it and they may not under cover of the protection from discrimination afforded them under its provisions indirectly effect an amendment to that judgment so as to wrest from ASCAP a type of license it is now under no judicial compulsion to grant. Here we do not have a petition for modification of the consent judgment filed by a party to the judgment.

The petition will be entertained if petitioners so elect to proceed within ten (10) days from the date hereof, as one filed for fixation of reasonable fees on a renewal of the type of license that is now and for many years past has been held by them.

Dated New York, September 14th, 1962.

/s/ Sylvester J. Ryan
U. S. D. J.

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No. 323

IN THE

Supreme Court of the United States

October Term, 1963

SHENANDOAH VALLEY BROADCASTING, INC., *et al.*,
Petitioners,

—against—

AMERICAN SOCIETY OF COMPOSERS,
AUTHORS AND PUBLISHERS,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS IN OPPOSITION

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August 30, 1963

INDEX

	PAGE
Brief of Respondent American Society of Composers, Authors and Publishers In Opposition ..	1
Question Presented	1
Statutes Involved	2
Statement	2
Argument	4
I. The Decision Below Is Clearly Correct ...	5
An Appeal Cannot Be Taken to the Court of Appeals in a Civil Action Brought by the United States under the Antitrust Laws	5
II. There Is No Conflict of Decisions	8
III. There Is No Important Question of Federal Law	11
Conclusion	13

CITATIONS

CASES:

Aluminum Company of America v. *United States*, 302 U. S. 230 (1937)	7
Arkadelphia Milling Co. v. *St. Louis Southwestern Ry. Co.*, 249 U. S. 134 (1919)	6-7
Brown Shoe Co. v. *United States*, 370 U. S. 294 (1962)	5
Chrysler Corporation v. *United States*, 316 U. S. 556 (1942)	6
Ford Motor Co. v. *United States*, 335 U. S. 303 (1948)	6
Magee-Hale Park-O-Meter Co. v. *Vehicular Parking, Ltd.*, 180 F. 2d 879 (3d Cir. 1950) ...	10, 11

PAGE

St. Louis, Iron Mountain & Southern Ry. Co. v. *J. F. Hasty & Sons*, 255 U. S. 252 (1921) .. 7

Sam Fox Publishing Co. v. *United States*, 366 U. S. 683 (1961) 6

Shenandoah Valley Broadcasting, Inc., et al. v. *ASCAP*, 371 U. S. 540 (1963) 8

Swift & Co. v. *United States*, 276 U. S. 311 (1928) 6

Terminal Railroad Ass'n of St. Louis v. *United States*, 266 U. S. 17 (1924) 7

United States v. *ASCAP*, S.D.N.Y. Civ. No. 13-95 3

United States v. *California Cooperative Canneries*, 279 U. S. 553 (1929) 5, 6

United States v. *FMC Corp.*, Memorandum Opinion of Mr. Justice Goldberg, Aug. 9, 1963 ..... 9, 10

United States v. *Swift & Co.*, 286 U. S. 106 (1932) 6

United States v. *Terminal Railroad Ass'n of St. Louis*, 236 U. S. 194 (1915) 6

STATUTES AND RULES:

Expediting Act of February 11, 1903, 32 Stat. 823 (1903), as amended, 15 U.S.C. §29 (1952) 2, 3, 5, 6, 7, 8, 9, 10, 12

28 U.S.C. §1291 .....2, 9, 10

28 U.S.C. §1292 9

Rule 73(a) of the Federal Rules of Civil Procedure 8

MISCELLANEOUS:

Hart & Wechsler, The Federal Courts and The Federal System (1953) 6

Robertson & Kirkham, Jurisdiction of the Supreme Court (Wolfson & Kurland ed. 1951) 6

Senate Bill 1892, 88th Cong., 1st Sess. (1963) .. 12, 13

IN THE

Supreme Court of the United States

October Term, 1963

No. 323

SHENANDOAH VALLEY BROADCASTING, INC., et al.,

Petitioners,

—against—

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS IN OPPOSITION

Respondent, American Society of Composers, Authors and Publishers ("ASCAP" or the "Society"), submits this brief in opposition to the petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit.

Question Presented

The Society respectfully submits that the only question here raised is the following:

In a civil antitrust action brought by the United States and subject to the Expediting Act (15 U.S.C. §29), did the Court of Appeals correctly decide it lacked jurisdiction to entertain an appeal filed by persons who are not parties to the action and whose prior direct appeal to this Court had been dismissed?

Statutes Involved

The pertinent statutory provisions here involved are Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823 (1903), as amended, 15 U.S.C. §29 (1952), and 28 U.S.C. §1291 (1952).

Section 2 of the Expediting Act provides:

> "In every civil action brought in any district court of the United States under any of said Acts [the antitrust laws], wherein the United States is complainant, an appeal from the final judgment of the district court will lie only to the Supreme Court."

28 U.S.C. §1291 provides:

> "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

Statement

On December 18, 1961, petitioners, acting as the "All-Industry Television Station Music License Committee", applied to the United States District Court for the South-

ern District of New York for an order determining the reasonable fee to be paid for a music performance license on terms prescribed by petitioners and differing radically from those theretofore requested and obtained by petitioners from ASCAP (R. 43a-65a).* Petitioners claimed that they were entitled to this relief under provisions of the Amended Final Judgment which had been entered on consent in 1950 in the Government's antitrust action against ASCAP (*United States* v. *ASCAP*, S.D.N.Y. Civ. No. 13-95).

On September 14, 1962, the District Court ruled that it had no power under the consent decree to compel ASCAP to issue a license on the terms demanded by petitioners and that, therefore, the Court could not fix a fee for such a license (App. C to Petition). The Court afforded petitioners an opportunity to apply for the type of license to which they are entitled under the consent decree (App. C6), but petitioners refused to do so, whereupon their application was dismissed by the District Court on October 10, 1962 (R. 10a).

Petitioners then sought to appeal directly to the Supreme Court under the Expediting Act. That attempted appeal was dismissed by this Court on January 14, 1963 (R. 293a).

After dismissal of their attempted appeal to this Court, petitioners sought to appeal to the United States Court of Appeals for the Second Circuit. Respondent moved to dismiss that appeal for lack of jurisdiction and the Govern-

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* Page references prefixed by the symbol "R." refer to petitioners' appendix filed in the Court of Appeals, which is Volume I of the record herein.

ment supported the motion. The Court of Appeals granted the motion, and the appeal was dismissed on May 7, 1963 (App. B to Petition). Petitioners are now seeking a writ of certiorari to review the judgment dismissing that attempted appeal.

Argument

The petition for a writ of certiorari should be denied for the following reasons:

1. The Court of Appeals correctly ruled that it was without jurisdiction to entertain an appeal in a civil action that was brought by the United States under the antitrust laws.

2. There is no conflict of decisions that warrants review by this Court.

3. In any event, the issue raised by the petition is uniquely narrow and does not warrant review by this Court.

I.

The Decision Below is Clearly Correct

An Appeal Cannot Be Taken to the Court of Appeals in a Civil Action Brought by the United States under the Antitrust Laws

An appeal in a civil action brought by the United States under the antitrust laws can be taken only from "the final judgment of the district court" and "will lie only to the Supreme Court". 15 U.S.C. §29 (1952); *United States* v. *California Cooperative Canneries,* 279 U. S. 553 (1929). Thus, as the Supreme Court stated in *California Cooperative Canneries* (per Mr. Justice Brandeis), "the Court of Appeals was without jurisdiction of an appeal in a suit in equity under the Antitrust Act in which the United States is the complainant." 279 U. S. at 559. See also *Brown Shoe Co.* v. *United States,* 370 U. S. 294, 305 n. 9 (1962).

The *California Cooperative Canneries* case is particularly applicable because there, as here, the order involved (an order of the District Court denying leave to intervene) was entered long after the entry of the consent decree in issue and was entered against a non-party rather than against the United States or a party defendant. The Court observed that the Expediting Act was similar to a predecessor act in that "in cases where the appeal was taken direct to this Court from the final decree in the trial court, every appeal thereafter taken in the cause was necessarily also to this Court." 279 U.S. at 559.

Whether the appeal is sought to be taken by a party or a non-party, the Supreme Court has never departed from

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the rule that appeals in actions coming within the reach of the Expediting Act can be taken, if at all, only to the Supreme Court. Indeed, in the recent past, an appeal from an order in this very action was taken directly to the Supreme Court. *Sam Fox Publishing Co.* v. *United States,* 366 U. S. 683 (1961).

It is thus clear that, where an action is one within the compass of the Expediting Act, the Act "precludes an appeal to the court of appeals." *Hart & Wechsler, The Federal Courts and The Federal System* 1372 (1953); *Robertson & Kirkham, Jurisdiction Of The Supreme Court* §171 (Wolfson & Kurland ed. 1951). This is true even for proceedings brought after the entry of the final judgment in the original action if those proceedings are instituted as part of, or as a supplement to, an action within the coverage of the Expediting Act.

For example, an appeal lies directly to the Supreme Court from a decree of the District Court modifying its prior decree, *Ford Motor Co.* v. *United States,* 335 U. S. 303 (1948); *Chrysler Corporation* v. *United States,* 316 U. S. 556 (1942); *United States* v. *Swift & Co.,* 286 U. S. 106 (1932), or from a decree of the District Court entered upon the mandate of the Supreme Court. *United States* v. *Terminal Railroad Ass'n of St. Louis,* 236 U. S. 194 (1915). Where an application to vacate the final decree is made pursuant to a reservation in that decree, the ruling on the motion is appealable directly to the Supreme Court. *Swift & Co.* v. *United States,* 276 U.S. 311 (1928).

Appeals from supplemental decrees run directly to the Supreme Court, *United States* v. *California Cooperative Canneries,* 279 U. S. 553, 559 (1929); *Arkadelphia Mill-*

ing Co. v. *St. Louis Southwestern Ry. Co.*, 249 U. S. 134 (1919); *St. Louis, Iron Mountain & Southern Ry. Co.* v. *J. F. Hasty & Sons*, 255 U. S. 252 (1921), as does the appeal from a decree entered by the District Court in a civil contempt proceeding brought to enforce rights claimed under a prior decree which was directly appealable to the Supreme Court. *Terminal Railroad Ass'n of St. Louis* v. *United States*, 266 U. S. 17 (1924).

Even where the defendants attempted to restrain the United States from bringing another antitrust action—some 25 years after the first suit—an appeal from the District Court order on the application went directly to the Supreme Court. *Aluminum Company of America* v. *United States*, 302 U. S. 230 (1937).

The purpose of the Expediting Act would be defeated if private persons not parties to a consent decree could appeal questions of its construction to the Court of Appeals. To permit such appeals would produce the possible anomaly that, if the judgment dissatisfied both ASCAP and a non-party applicant under Section IX, ASCAP would appeal to the Supreme Court while the non-party applicant would appeal the same question to the Court of Appeals. Or if the judgment dissatisfied both the United States and a non-party, the United States might appeal to the Supreme Court while the non-party applicant was seeking review in the Court of Appeals.

Clearly, then, the Court of Appeals could not entertain the petitioners' attempted appeal from the judgment of the District Court, which was entered in a proceeding brought under the consent decree in the Government's antitrust action against ASCAP and which construed the scope and meaning of that decree and refused to modify it.

Nor can petitioners escape the Expediting Act by claiming that their appeal is not in a civil antitrust action commenced by the United States, as they apparently attempt to do in claiming that "the present proceeding involves an essentially private controversy between petitioners and ASCAP" (Petition, p. 9). If this characterization is correct, petitioners have their private remedies available, since the judgment of the District Court bound them to nothing.*

Furthermore, the appeal to the Court of Appeals was filed more than 30 days after the judgment of the District Court and therefore, unless taken under the 60-day time limit for suits in which the United States is a party, must be dismissed for lack of jurisdiction as untimely. Rule 73(a), Fed. Rules Civ. Proc. Thus, even if the action were not one in which the United States is a party, the Court of Appeals would have lacked jurisdiction because the appeal thereto would have been untimely.

II.

There Is No Conflict of Decisions

Petitioners assert that the dismissal of their attempted appeal to the Court of Appeals conflicts with the decision of this Court of January 14, 1963, *Shenandoah Valley Broadcasting, Inc., et al.* v. *ASCAP*, 371 U. S. 540 (1963)

* Petitioners would not have been bound even if they had elected to obtain determination of a fee for the type of license ASCAP is required to grant them. The music user who applies under Section IX of the Amended Final Judgment does not thereby become a party to the action. Under Section IX, ASCAP is bound to issue such a license at the fee determined by the Court, but the music user is not obliged to take it. Thus, the Court's determination under Section IX does not bind the music user to anything.

(R. 293a), dismissing for "want of jurisdiction" petitioners' attempt to take a direct appeal to the Supreme Court under the Expediting Act.

Petitioners urge that, since this Court has held it lacked jurisdiction over petitioners' direct appeal, Section 1291 vests jurisdiction in the Court of Appeals. Petitioners suggest that this must follow because Section 1291 gives the Court of Appeals jurisdiction of all appeals from all final decisions of the District Courts "except where a direct review may be had in the Supreme Court." This reading of Section 1291, as Mr. Justice Goldberg recently held in considering an exactly parallel question arising under the same exception clause in Section 1292 of the Judicial Code,

> "would do violence to the plain meaning of the Expediting Act, the basic congressional policy there expressed, and the decisions of this Court. . . .". *United States* v. *FMC Corp.*, denial of application for preliminary injunction, August 9, 1963 (Slip Opinion pp. 5-6).

As Mr. Justice Goldberg's opinion makes crystal clear, the exceptions to Sections 1291 and 1292 exclude from the jurisdiction of the Courts of Appeals any decision—final or interlocutory—in an antitrust action brought by the United States. An appeal to the Supreme Court under the Expediting Act may be dismissed for a multitude of reasons, such as lack of finality, or lack of standing to appeal by the person seeking review, or lack of standing to intervene before the District Court. If this Court lacks appellate jurisdiction under the Expediting Act for such a reason, the result is that no appeal may be taken and not, as petitioners urge, that Section 1291 creates substitute appellate jurisdiction in the Court of Appeals.

Petitioners, who were not parties to the antitrust action brought by the United States, sought review in this Court under the Expediting Act of a ruling by the District Court that they were, in effect, seeking a modification of the consent decree which they had no standing to seek. As the Court of Appeals pointed out (Petition, App. B-8 – B-10), this Court's dismissal of their appeal was parallel to dismissals, by this Court, of appeals in Government antitrust cases by persons asserting abuse of discretion in denial of permissive intervention or error in the denial of intervention claimed as of right.

Dismissal of petitioners' attempted direct appeal no more created appellate jurisdiction in the Court of Appeals than in any of the intervention cases dismissed by this Court. Accordingly, the decision of the Court of Appeals is consistent with prior decisions of this Court, including the latest expression on a parallel question by Mr. Justice Goldberg in *United States* v. *FMC Corp.*, *supra*. Indeed, Mr. Justice Goldberg cited the instant decision of the Court of Appeals with approval. *Id.*, Slip Opinion, p. 3 n. 7.

Petitioners also seek to create a conflict of rulings between different circuits by citing *Magee-Hale Park-O-Meter Co.* v. *Vehicular Parking, Ltd.*, 180 F. 2d 879 (3d Cir. 1950). Again, Judge Friendly correctly disposed of this contention when he observed with respect to the brief suggestion of Judge Biggs that an appeal might some day be taken to the Court of Appeals in a proceeding brought under a Government antitrust decree:

> "It is wholly unrealistic to take this remark as a considered determination that, despite the plainly

contrary implications of *Terminal R.R. Ass'n* v. *United States*, 266 U. S. 17, 28 (1924), such an appeal would lie to the court of appeals rather than to the Supreme Court. Prompted by a question from the bench, counsel for ASCAP have furnished us with copies of the briefs in Magee-Hale; they reveal no discussion of that issue, which, indeed, was hardly relevant. As our own experience has shown, *United States* v. *New York, N.H. & H.R.R.*, 276 F. 2d 525, 537 (2 Cir.), *cert. denied*, 262 U. S. 961 (1960), it is all too easy for a court of appeals, which exercises general appellate authority over final decisions of district courts, to forget, unless reminded by counsel, that a few such appeals are not its business. When an issue as to its role in appeals under the Expediting Act has been squarely presented, the Third Circuit has made its position plain. *Missouri-Kansas Pipe Line Co.* v. *United States*, 108 F. 2d 614 (3 Cir. 1939), *cert. denied*, 309 U. S. 687 (1940). Appellants' reliance on the statement in Magee-Hale is thus answered *a fortiori* by what Chief Justice Marshall said long ago: 'No question was made, in that case, as to the jurisdiction. It passed *sub silentio*, and the Court does not consider itself as bound by that case.' *United States* v. *More*, 3 Cranch. (7 U. S.) 159, 172 (1805)."

III.

There Is No Important Question of Federal Law

In striving to give the issue they seek to present a generalized significance, petitioners point out that "many antitrust decrees entered in recent years contain provisions allowing specified persons or classes of persons, not parties

to the antitrust decree itself, to apply to the district court in which the decree was entered for enforcement of certain provisions thereof enacted for their benefit" (Petition at p. 13).

Petitioners then cite a number of consent decrees that contain provisions enabling non-parties to obtain judicial fee determinations when they cannot agree on the fee for the use of a patent or some other property. Petitioners ignore the fact that their appeal does not raise that question because the proceedings below never reached a fee determination. Petitioners declined to proceed to such a determination. Hence they seek to appeal only from an order of the District Court which ruled that the petitioners —who were not parties to the Government's antitrust action or to the consent decree entered therein—cannot obtain a modification of the decree. The United States did not appeal from the dismissal of the petitioners' application and, indeed, supported ASCAP's motion to dismiss the appeal to the Court of Appeals.

Petitioners also attempt to brush aside the pending Senate bill that may result in a complete revision of the Expediting Act and thereby make the Court of Appeals' decision a matter of only historical interest.

Although Senate Bill 1892 (88th Cong., 1st Sess.) contains no provisions relating specifically to the rights of non-party beneficiaries under decrees entered in Government antitrust actions, the decision of the Court of Appeals did not turn on whether the appellants are parties or non-parties. It held that, in Government antitrust actions, no appeal may be taken to the Court of Appeals whether ap-

pellants are parties or non-parties. S. 1892, if enacted, will clearly change the law on that point.*

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

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August 30, 1963

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* S. 1892, 88th Cong., 1st Sess. (1963), provides, in pertinent part:

"In any action in which a certificate has not been filed, appeal may be taken to the court of appeals from any final judgment entered therein, as provided in section 1291 of title 28 of the United States Code, and from interlocutory orders, as provided in section 1292(a)(1) of title 28 of the United States Code but not otherwise; and any judgment entered by the court of appeals in such case shall be subject to review by the Supreme Court of the United States upon a writ of certiorari as provided in section 1254(1) of title 28 of the United States Code."

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No. 323

SHENANDOAH VALLEY BROADCASTING, INC., *et al.*,

Petitioners,

against

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS,

Respondent.

REPLY TO RESPONDENT'S BRIEF OPPOSING CERTIORARI

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Respondent places great reliance on the opinion of Justice Goldberg, filed August 9, 1963, in *United States* v. *FMC Corp. and American Viscose Corp.* That opinion dealt with whether the Expediting Act precluded an appeal from a denial of a preliminary injunction in a Government antitrust action. No such question is presented here. The judgment appealed from herein is a final judgment dismissing petitioners' application in an ancillary proceeding brought at the foot of an earlier antitrust decree (R. 7a-11a).

Petitioners do not contend, as respondent asserts, that petitioners have a right to appeal this judgment to the

Court of Appeals whereas the United States and ASCAP can appeal to this Court (Respondent's Brief, p. 7). Petitioners contend that the judgment herein dismissing petitioners' application does not fall within the scope of the Expediting Act; hence any appeal from such a judgment, either by a party or a non-party to the original antitrust action, would be to the Court of Appeals under 28 U. S. C. §1291. Such a result is not in any way inconsistent with the purposes of the Expediting Act. The judgment determining such an ancillary proceeding, while a final judgment entered in the original antitrust action, is neither the final judgment referred to in the Expediting Act nor so closely connected thereto as to warrant direct review by this Court. Respondent's contention that the Expediting Act precludes an appeal to the Court of Appeals in this case would, in effect, interpret the Expediting Act as precluding any appeal, either to this Court or the Court of Appeals, from an otherwise appealable judgment of dismissal. Certainly the Expediting Act was never intended to preclude any appellate review of such final judgments and should not be so interpreted.

The distinction sought to be drawn by respondent between the appeal herein and an appeal in a fee determination case is untenable. Petitioners' application was for the fixing of a fee on licenses which petitioners contended the decree required ASCAP to issue. The question presented by petitioners' application was not whether the decree should be modified to provide for the type of licenses sought by petitioners, but whether, correctly interpreted, it already so provides. Like issues could arise under any of a number of antitrust decrees with compulsory licensing

provisions that have been entered in numerous industries; for example, issues as to the particular patent rights or technical know-how which are covered by a decree providing for compulsory patent licensing. Respondent suggests no reason why such issues should stand on any different footing as to reviewability from issues as to the rate of royalty. Thus, the question presented here, whether non-party applicants under compulsory licensing provisions of antitrust decrees are entitled to appellate review of a District Court's disposition of their applications, is a question of general importance under the antitrust laws and should be decided by this Court.

Respectfully submitted,

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PETITION FOR REHEARING

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Respondent, American Society of Composers, Authors and Publishers, respectfully requests this Court to amend the last sentence of its *per curiam* opinion of October 21, 1963, and remand the cause to the Court of Appeals for "further proceedings not inconsistent with this opinion", instead of "for consideration on its merits", as the opinion now provides.

In its *per curiam* opinion, this Court concluded that "the controversy . . . disposed of by the District Court's order" was "entirely between private parties" and, therefore, the appeal sought by petitioners is not one within the

coverage of the Expediting Act. The Court then held that an appeal by petitioners does lie from the District Court's order to the Court of Appeals under 28 U.S.C. § 1291.

Nothing in the opinion indicates that the Court considered the further and necessary question of the timeliness of petitioners' attempted appeal to the Court of Appeals.

Rule 73(a) of the Federal Rules of Civil Procedure provides that a notice of appeal to the Court of Appeals shall be filed within 30 days from the entry of judgment in the District Court, except that where the United States is a party, 60 days shall be allowed for filing a notice of appeal.

Respondent has contended before both the Court of Appeals* and this Court** that, if petitioners' attempted appeal is not within the reach of the Expediting Act, petitioners failed to perfect their appeal to the Court of Appeals because they did not comply with the 30-day requirement of Rule 73(a). Petitioners filed their notice of appeal with the Court of Appeals 57 days after the entry of the order of the District Court dismissing their petition.

Whether to allow 60 days for an appeal where the controversy is "entirely between private parties" and is not one in which the Government is "directly concerned", as this Court has now found, is a question which the Court of Appeals should be left free to answer before it proceeds to consider the merits of the appeal. As the Court of Appeals

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* Appellee's Brief in Court of Appeals, pp. 22-24.

** Respondent's Brief in Opposition to Petition for Certiorari, p. 8.

for the Fifth Circuit stated in *Virginia Land Co.* v. *Miami Shipbuilding Corp., et al.*, 201 F. 2d 506, 508 (5th Cir. 1953):

> "The whole basis of the [60-day] exception, as is shown in the note of the Advisory Committee on Rules, pp. 428-429, 28 U.S.C.A., Rule 52 to End, Federal Rules of Civil Procedure, was the affording to others in respect of matters, in which the United States was interested, the same time for appeal which had been extended to the United States. *It was not intended to change the rule in respect to appeals by other persons from orders with which the United States had no concern simply because of the fact that the United States was a party to the proceeding below but not to the issues involved in the appeal.*" (Emphasis added.)

Failure to file a notice of appeal within the time limits contained in Rule 73(a) constitutes a jurisdictional defect which bars an appeal. *Martin* v. *Hess*, 176 F. 2d 834, 835 (6th Cir. 1949); *Edwards* v. *Doctors Hospital, Inc.*, 242 F. 2d 888, 891 (2d Cir. 1957); *Barta* v. *Oglala Sioux Tribe of Pine Ridge Reservation*, 259 F. 2d 553 (8th Cir. 1958). Neither the Court of Appeals, in its dismissal of petitioners' attempted appeal thereto, nor this Court, in its opinion reversing the judgment of the Court of Appeals, reached or discussed this necessary jurisdictional issue. But the language of this Court's opinion, in remanding the cause to the Court of Appeals "for consideration on its merits", could give rise to an argument by the appellants that the decision of this Court precludes the Court of Appeals from considering this jurisdictional issue.

We therefore request that the opinion and mandate of this Court be modified in the manner suggested above.

Precedent for this treatment can be found in *Union Trust Co.* v. *Eastern Airlines,* 350 U.S. 962 (1956), where this Court, upon consideration of a petition for rehearing following a summary reversal, modified its previous order by directing "that the case be remanded to the Court of Appeals to permit that Court to pass upon the several issues left undecided by our reversal of its judgment."

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November 7, 1963

Certificate of Counsel

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court.

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PETITIONERS' BRIEF OPPOSING RESPONDENT'S PETITION FOR REHEARING

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INDEX

PAGE

PETITIONERS' BRIEF OPPOSING RESPONDENT'S PETITION FOR REHEARING 1

CONCLUSION 9

APPENDIX A, MEMORANDUM OF PLAINTIFF 1a

CITATIONS

Cases:

American Export Lines v. *Revel*, 262 F. 2d 122 (4th Cir.) 3, 7

Blossom v. *Milwaukee & C. Railroad Co.*, 1 Wall. 655 2

Commercial Electrical Supply Co. v. *Curtis*, 288 Fed. 657 (8th Cir.), at pp. 659-60, *cert. denied*, 263 U. S. 709 2

Dickey v. *Turner*, 49 F. 2d 998 (6th Cir.), at p. 1001 2

Division of Labor Law Enforcement v. *Stanley Restaurants, Inc.*, 228 F. 2d 420, at p. 423 (9th Cir.) 3, 7

Drummond v. *United States*, 324 U. S. 316 at p. 318 7

East v. *Crowdus*, 302 F. 2d 645, 646-647 (8th Cir.) 2, 3, 5, 6, 8

Fishgold v. *Sullivan Drydock & Repair Corp.*, 328 U. S. 275 at pp. 281-82 7

Goldlawr, Inc. v. *Heiman*, 273 F. 2d 729 at p. 731 (2d Cir. 1959) 9

Gully v. *Interstate Natural Gas Co.*, 292 U. S. 16 at p. 19 8

PAGE

Hume v. *City of New York*, 255 Fed. 488 (2d Cir.), 491, *cert. denied*, 249 U. S. 603 2

Julian v. *Central Trust Co.*, 193 U. S. 93, 111-13 2

Langnes v. *Green*, 282 U. S. 531 1

Minnesota Co. v. *St. Paul Co.*, 2 Wall. 609, 632-33 2

Oklahoma Gas & Electric Co. v. *Oklahoma Packing Co.*, 292 U. S. 386 at p. 392 8

Phillips v. *United States*, 312 U. S. 246 at p. 254 8

United States v. *American Railway Express Co.*, 265 U. S. 425, 435 1

United States v. *American Society of Composers, Authors and Publishers*, ... 3, 4fn

United States for the use of Browne & Bryan Lumber Co. v. *Massachusetts Bonding and Insurance Co.*, 29 F. R. D. 162 (E. D. N. Y.) 7

United States v. *New York, New Haven and Hartford Railway Co.*, 276 F. 2d 525, 544-45 (2d Cir. 1960), *cert. denied*, 362 U. S. 961 9

Virginia Land Co. v. *Miami Shipbuilding Corp.*, 201 F. 2d 506 (5th Cir.) 7, 8

Walling v. *Reuter Co.*, 321 U. S. 671 at pp. 676-678 8

Statutes:

Federal Rules of Civil Procedure, Rule 73(a) 2, 5, 7

28 U. S. C. §2107 ..... 2, 5, 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 323

SHENANDOAH VALLEY BROADCASTING, INC., *et al.*,

Petitioners,

against

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS,

Respondent.

PETITIONERS' BRIEF OPPOSING RESPONDENT'S PETITION FOR REHEARING

Respondent's petition for rehearing should be denied because it is based on the same contention that respondent previously advanced in opposing petitioners' application for a writ of certiorari. At that time respondent contended, as an alternative ground for sustaining the Court of Appeals' dismissal of petitioners' appeal to that court, that petitioners' notice of appeal was untimely (Respondent's Brief in Opposition to Petition for Certiorari, p. 8). In reversing the Court of Appeals and directing it to hear petitioners' appeal on the merits, this Court of necessity passed on and rejected this contention (*Langnes v. Green*, 282 U. S. 531; *United States* v. *American Railway Express Co.*, 265 U. S. 425, 435). Respondent's petition for rehearing is not based on intervening circumstances of substantial or controlling effect, or on a point not previously presented

to this Court, the only grounds for rehearing available under Rule 58(2) of this Court, but is simply an effort to reargue the merits of this Court's decision.

This Court's previous rejection of respondent's contention was plainly correct. This Court has described the proceedings below as "ancillary" to the United States' action against respondent. Being ancillary, the proceedings on petitioners' application were a continuation of the original suit brought by the United States; petitioners became parties to the original suit for the purpose of asserting their rights under the decree in that suit, and jurisdiction, even of the District Court, depended (in this case necessarily so, since the particular rights asserted by petitioners were created by the Consent Decree) upon its jurisdiction in the original suit. *Blossom* v. *Milwaukee & C. Railroad Co.*, 1 Wall. 655; *Minnesota Co.* v. *St. Paul Co.*, 2 Wall. 609 (and see especially pp. 632-33); *Julian* v. *Central Trust Co.*, 193 U. S. 93 at pp. 111-13; *East* v. *Crowdus*, 302 F. 2d 645, at pp. 646-647 (8th Cir.); *Hume* v. *City of New York*, 255 Fed. 488 (2d Cir.), at p. 491, *cert. denied*, 249 U. S. 603; *Dickey* v. *Turner*, 49 F. 2d 998 (6th Cir.), at p. 1001; *Commercial Electrical Supply Co.* v. *Curtis*, 288 Fed. 657 (8th Cir.), at pp. 659-60, *cert. denied*, 263 U. S. 709.

28 U. S. C. §2107 and Rule 73(a) of the Federal Rules of Civil Procedure provide that in any action, suit or proceeding in which the United States, or an officer or agency thereof, is a party, *all* the parties have 60 days from the entry of judgment to file a notice of appeal. Under the statute and Rule 73(a), the only requirement for the 60-day period to become applicable in ancillary proceedings is

that the United States continue to be a party to the original proceedings before the district court. *East* v. *Crowdus*, 302 F. 2d 645, at pp. 646-647 (8th Cir.); cf. *American Export Lines* v. *Revel*, 262 F. 2d 122 (4th Cir.); cf. also *Division of Labor Law Enforcement* v. *Stanley Restaurants, Inc.*, 228 F. 2d 420, at p. 423 (9th Cir.). This precise question was decided by the Court of Appeals for the Eighth Circuit in *East* v. *Crowdus*, 302 F. 2d 645, where the court concluded that the petitioner, in a proceeding ancillary to an action brought by the SEC, had 60 days to appeal from the district court's dismissal of his petition (302 F. 2d at pp. 646-647). As long as the United States continues as a party to the original proceeding it continues to have an interest and right to be heard in the ancillary proceeding, and a right to appeal to the Court of Appeals from a final order entered therein.

The requirement that the United States continue as a party to the original proceedings is met here. Petitioners did not proceed against respondent by way of a separate lawsuit, but upon motion made by petitioners "at the foot of the ASCAP final judgment" (R. 46a)[1] in *United States* v. *American Society of Composers, Authors and Publishers*, Civil Action No. 13-95. The Court of Appeals found that the proceedings on petitioners' application were "all conducted under the title of the original anti-trust suit" (Appendix to Petition for Writ of Certiorari, p. B3). The Court of Appeals further pointed out that "the judgment here sought to be appealed from was entered in 'a civil

[1] Page references prefixed by the symbol "R." refer to petitioners' appendix filed in the Court of Appeals for the second Circuit, which is Volume 1 of the record herein.

action brought in [a] District Court of the United States' under the Sherman Act 'wherein the United States is complainant'" (*id.*, p. B5).

The United States actively participated in the proceedings before the district court on petitioners' application. Government counsel appeared before the district court in the proceedings on petitioners' application and advised the court that "we are here as the plaintiff in the original suit" (R. 147a).* Both oral argument and written briefs** were submitted on behalf of the United States on the issue of the district court's power to grant the type of license requested by petitioners (R. 153a). In its opinion the district court pointed out that the United States supported petitioners' application and then rejected the United States' view in favor of the respondents' (Appendix to Petition for Writ of Certiorari, p. C2). The United States also actively participated in petitioners' appeal to the Court of Appeals, where the United States supported respondent's position that the only appeal from the judgment of the district court was directly to this Court under the Expediting Act, and submitted both oral argument and a lengthy brief to the court. In this case, the issue before the District Court—namely, whether the Consent Decree was intended to protect those dealing with ASCAP against future abuses of

* To assure that the Government receives adequate notice of all such proceedings, the decree in *United States* v. *American Society of Composers, Authors and Publishers* specifically provides that ASCAP shall, upon the filing of an application, "promptly give notice thereof to the Attorney General" (35a).

** A copy of one of two briefs submitted by the Government, entitled *"Memorandum of Plaintiff,"* is annexed to this brief as Appendix A.

monopolistic power in respect of all license terms, or solely in respect of price—was of deep interest to the United States. Thus the present case is even stronger than *East* v. *Crowdus*, 302 F. 2d 645, for in that case the SEC took no active part in the ancillary proceedings, while here the United States did take an active part in the proceedings on petitioners' application.

The fact that an order entered in an ancillary proceeding is not directly appealable under the Expediting Act does not affect the applicability of 28 U. S. C. §2107, and of Rule 73(a), to the present case, since the language and objectives of these statutes differ. An ancillary order is not appealable under the Expediting Act because the order, unlike one in the original proceeding, does not necessarily affect the final judgment. The United States, however, continues as a party within the meaning of 28 U. S. C. §2107 and Rule 73(a) because it has an interest and right to be heard in an ancillary proceeding which affects the construction of the judgment, and since an order construing the judgment would be *res adjudicata* as to all the parties to the judgment, including the United States, the United States must have a right to appeal therefrom to the Court of Appeals.

Literally, the Expediting Act provides for a direct appeal to this Court only from the final judgment in a suit under the antitrust laws in which the United States is the complainant. This carries with it, of course, direct appellate jurisdiction of appeals from other final orders in the cause which necessarily and directly affect the final judgment. By its earlier decision in this case, this Court has determined that since a final order in an ancillary proceed-

ing granting or denying to a beneficiary relief specifically created by the decree will not necessarily affect the final judgment but on the contrary will in many cases merely serve to resolve an essentially private controversy by applying the provisions of the decree to a particular factual situation, appeals in such cases should take the normal appellate route via the Courts of Appeal.

It by no means follows, however, that the United States, whose decree is in fact involved, was not properly a party to the proceeding below (in which, as we pointed out earlier, it took an active role), and there is nothing in the opinion of the Court in this case to suggest that the Court meant to rule otherwise.

The contention that respondent makes here rests on the unstated assumptions, as the Eighth Circuit Court of Appeals pointed out in *East* v. *Crowdus*, 302 F. 2d 645, at pp. 646-7, that (i) although the Government actively participated in the proceedings before the District Court, involving the proper interpretation of its antitrust consent decree, it actually had no right to be heard therein, and (ii) that even after having so participated, the Government could not have taken an appeal from the decision of the district court expressly rejecting the Government's proposed construction. Since the Government here actively participated in the proceedings before the district court, there can be no serious question but that under well-established principles of law the construction of the decree adopted by the district court became *res adjudicata* as to it and, therefore, all other considerations aside, the Government could in this case have taken an appeal if it so desired, albeit to the Court of Appeals rather than to this

Court.* *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U. S. 275 at pp. 281-282; see, also, *Drummond* v. *United States*, 324 U. S. 316 at p. 318. Accordingly, 28 U. S. C. §2107 and Rule 73(a) give to the United States, and therefore by their express terms and as a matter of common fairness to all other parties, the longer period of sixty days in which to determine whether or not an appeal should be taken.

The facts in *Virginia Land Co.* v. *Miami Shipbuilding Corp.*, 201 F. 2d 506 (5th Cir.), relied on by respondent, are entirely different. In that case the Government's money claim had been settled and the Government had no further interest in any aspect of the suit whatever. Moreover, the quotation from the court's opinion relied on by respondent at page 3 of its brief is dictum, since the court went on to rule that the appeal should be dismissed for lack of finality in the order appealed from (201 F. 2d at p. 508). The suggestion of the court that the applicability of the 60-day provision turns on the issues presented on the appeal has been rejected by all courts that have subsequently considered the point. *Division of Labor Law Enforcement* v. *Stanley Restaurants, Inc.*, 228 F. 2d 420, at p. 423 (9th Cir.); *American Export Lines* v. *Revel*, 262 F. 2d 122, at p. 126 (4th Cir.); *United States for the use of Browne & Bryan Lumber Co.* v. *Massachusetts Bonding and Insurance Co.*, 29 F. R. D. 162 (E. D. N. Y.).

In any event, no reason appears for remanding this case to the Court of Appeals for further consideration of this jurisdictional question. If the case of *Virginia Land*

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* See also Petitioners' Reply To Respondent's Brief Opposing Certiorari, p. 2.

Co. v. *Miami Shipbuilding Corp.*, 201 F. 2d 506 (5th Cir.), relied on by respondent, stands for the proposition for which respondent cites it (with which we do not agree), then that case is in conflict with the decisions of the courts in other circuits, notably the decision of the Eighth Circuit in *East* v. *Crowdus*, 302 F. 2d 645, and such a conflict can only be resolved by this Court. Respondent claims to find support for its position in certain language of this Court's *per curiam* opinion. Remanding the case to the Court of Appeals for an interpretation of this Court's opinion would be a meaningless gesture. If this Court is not inclined to dispose of respondent's contention without further briefs and arguments, we respectfully submit that the Court set the case down for argument.

In the event that this Court should decide that petitioners' notice of appeal was not timely, we respectfully suggest that the circumstances here warrant adoption of the procedure frequently followed by this Court in the exercise of its general appellate supervisory power, and on occasion by the Courts of Appeal, where a party has mistakenly taken an appeal to a court lacking jurisdiction and where (as here) the question of appellate jurisdiction was not definitely settled at the time of the appeal, by directing the entry of a fresh decree in the district court from which a timely appeal pursuant to the appropriate appellate procedure may be taken. *Walling* v. *Reuter Co.*, 321 U. S. 671 at pp. 676-678; *Gully* v. *Interstate Natural Gas Co.*, 292 U. S. 16 at p. 19; *Oklahoma Gas & Electric Co.* v. *Oklahoma Packing Co.*, 292 U. S. 386 at p. 392; *Phillips* v. *United States*, 312 U. S. 246 at p. 254. This result could be accomplished by this Court, in its mandate, directing the Court of Appeals to remand the cause to the district court

for proceedings accordingly, or by directing the district court to enter such a new decree. *United States* v. *New York, New Haven and Hartford Railway Co.*, 276 F. 2d 525, 544-45 (2d Cir. 1960), *cert. denied*, 362 U. S. 961; see also *Goldlawr, Inc.* v. *Heiman*, 273 F. 2d 729 at p. 731 (2d Cir. 1959).

CONCLUSION

The Court of Appeals has already implicitly rejected respondent's contention that petitioners' notice of appeal was untimely by its determination that the United States was a party to the proceedings below. This finding was implicitly confirmed by this Court, which recognized that the present proceedings were ancillary to the United States' action against the respondent. There is no basis, therefore, for respondent's contention that this case should be remanded to the Court of Appeals for further consideration of this question. The only remaining unresolved issues are as to the merits of the case.

For the reasons stated, respondent's petition for rehearing should be denied.

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 13-95

UNITED STATES OF AMERICA,

Plaintiff,

against

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, et al.,

Defendants.

In the Matter of the Application of

SHENANDOAH VALLEY BROADCASTING, INC., et al.,

Petitioners,

For the Determination of Reasonable License Fees.

Memorandum of Plaintiff

Petitioners have applied under Section IX of the judgment herein of March 14, 1950 for determination of the reasonableness of fees for those licenses which they have requested to play any composition in the ASCAP repertory on all programs originated by each of the petitioner's local

television stations, and all locally performed filmed or taped programs produced by others prior to February 28, 1962. ASCAP has not quoted a fee for the particular type of license requested. These comments are submitted by the plaintiff as the representative of the public interest in this proceeding.

At this stage of this proceeding, it appears that the issue posed by the application involves not only the reasonableness of the fees for the licenses involved, but also the obligation of the defendant, ASCAP, to issue the type of licenses requested. We believe that we do not have any particular, special competence to advise the Court concerning the reasonableness of the particular license rate proposed by the petitioners. We are, however, concerned with a possible construction of this judgment which limits the right of users of compositions of music, who as a practical matter, must have access to the ASCAP repertory, to a form of a license dictated by ASCAP. It is as to this latter point that we would like to make these initial comments.

Petitioners seek non-exclusive, five year licenses covering all the compositions in the ASCAP repertory granting the right to use such compositions on locally produced programs or on films or tapes produced before February 28, 1962. The request does not include licenses for the right to perform ASCAP compositions on network originated programs and on filmed or taped programs which were produced by others after the specified date (or some other appropriate date). It appears obvious to the plaintiff that the petitioners seek to create an economic vacuum which will force the film and tape producers concerned to obtain

licenses from either ASCAP members (at the same time they acquire synchronization rights) or from ASCAP itself covering performance rights for music contained in the tapes and films.

Plaintiff understands that ASCAP contends that the petitioners do not have a right to such a license under the judgment; that the judgment enumerates the types of licenses which ASCAP must grant, such as per program license or licenses to program producers under Section V (B); and that this is definitive of the licenses which must be issued. Further, ASCAP seems to claim that the licenses in effect protect the right of a broadcaster to obtain clearance at the source and benefit thereby. He may take a per program license. He need not pay a fee for programs the ASCAP music in which is licensed by an ASCAP member or which is licensed at the source by ASCAP under Section V of the judgment.

Plaintiff believes that the antitrust objectives of the 1950 judgment entered in this case require a construction which permits a broadcaster, who of necessity must have access to the thousands of compositions which ASCAP is authorized to license, a realistic, reasonable license to perform all the compositions in the ASCAP repertory. Stated another way, we believe that ASCAP should not be permitted, by limiting the types of licenses which it offers, to frustrate and render null the mandate of Section VI of the judgment that ASCAP "grant to any user making written application therefor a non-exclusive license to perform all of the compositions in the ASCAP repertory," so long as the applicant is requesting a reasonable type of license.

We know that Section IX of the 1950 judgment speaks in terms of the Court determining the reasonableness of the "fee" for a license, but it also specifies that it is the "fee" which ASCAP deems reasonable "for the license requested." It is the strong belief of the plaintiff that reference in Section IX to determination of the "fee" does not foreclose this Court from reviewing the terms and conditions of the license requested and, looking at the objectives of the judgment as a whole, determining whether ASCAP by refusing to advise the petitioners of the fee which it considers reasonable for the licenses requested is, in effect, refusing to comply with the requirements of Sections VI and IX.

It is fundamental to the antitrust considerations in this case and these proceedings that while ASCAP is legally the non-exclusive licensing agency for the performance rights of compositions of thousands of publishers and writers, it is a fact that petitioners must have licenses from ASCAP to use all of the compositions in the ASCAP repertory since it is not practical for them to obtain such licenses from individual owners of the copyrights involved. Thus, to say that the order of the 1950 judgment in Section VI leaves ASCAP free to dictate to an applicant a form of license covering the performance of ASCAP compositions on programs, at places or at times not desired by the applicant, permits ASCAP to exercise a power that comes not from a single copyright owner but from the amassing of so many copyrights.

We believe that the effect of the combined terms and objectives of Sections VI and IX of this Court's 1950 judg-

ment both permits and requires that ASCAP be ordered to advise the petitioners of the fee which it considers reasonable for the licenses requested, that the petitioners be entitled to a reasonable license which gives them the right to perform all of the compositions in the ASCAP repertory, all upon terms and conditions which this Court deems reasonable and in furtherance of the antitrust objectives of this case.

Respectfully submitted,

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Attorney, Department of Justice

January 17, 1962

W. D. Kilgore, Jr.
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Office-Supreme Court, U.S.
FILED
JAN 2 1964
JOHN F. DAVIS, CLERK

No. 323

IN THE

Supreme Court of the United States

October Term 1963

SHENANDOAH VALLEY BROADCASTING, INC., *et al.*,
Petitioners,

—against—

AMERICAN SOCIETY OF COMPOSERS,
AUTHORS AND PUBLISHERS,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY TO PETITIONERS' BRIEF OPPOSING RESPONDENT'S PETITION FOR REHEARING

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January 2, 1964

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SHENANDOAH VALLEY BROADCASTING, INC., *et al.*,
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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY TO PETITIONERS' BRIEF OPPOSING RESPONDENT'S PETITION FOR REHEARING

In its Petition for Rehearing Respondent requested clarification of the last sentence of the Court's memorandum opinion of October 21, 1963, to make clear that the Court of Appeals is free, upon the remand of the cause, to consider Respondent's contention that Petitioners' original appeal to the Court of Appeals was out of time for failure to comply with Rule 73(a), Fed. R. Civ. P. Respondent's Petition expressed concern that, absent such a clarification, this Court's remand of the cause "for consideration on its merits" might give rise to an argument by

Petitioners that this Court had considered and determined the further jurisdictional question adversely to Respondent. The Petitioners' Brief Opposing Respondent's Petition for Rehearing confirms the validity of this concern—Petitioners have argued at length that this Court reached and decided the Rule 73 question *sub silentio*.

Apart from the uncertainty arising from the wording of the remanding sentence of the opinion, nothing would seem clearer than that this Court decided only the Expediting Act issue and left for the Court of Appeals all other questions in the case, including the further jurisdictional question arising under Rule 73. This is the Court's usual practice where it has granted certiorari to consider a question of importance and where its disposition of that issue leaves remaining other questions which have not yet been considered by the courts below. *E.g., Aetna Casualty & Surety Co.* v. *Flowers*, 330 U.S. 464, 468; *United States* v. *Ballard*, 322 U.S. 78, 88.

Petitioners contend that this Court "of necessity" * passed on and rejected the Rule 73 contention, citing *Langnes* v. *Green*, 282 U.S. 531 and *United States* v. *American Railway Express Co.*, 265 U.S. 425, 435. Petitioners' reliance upon those cases is entirely unfounded--they involve only the unquestioned *power* of this Court to consider any argument made by a respondent, without cross-petition for certiorari, in support of the judgment below, including contentions not passed on and even contentions rejected by the Court below. See Stern and Gressman, Supreme Court

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* Petitioners' Brief Opposing Respondent's Petition for Rehearing, p. 1.

Practice 264 (1962). Petitioners err in reading these cases as imposing an obligation upon this Court to consider and decide such questions.*

The short answer to Petitioners' contention that this Court has already passed upon the Rule 73 question is the fact that the Court requested Petitioners to file a response to the Petition for Rehearing. Obviously the Court would not have required assistance from Petitioners in determining how to dispose of an issue already decided.

The Court's usual practice—remanding for further proceedings an unresolved issue which has become vital for the first time because of the Court's reversal of the ground for decision below—seems entirely appropriate here. Although the question is of obvious importance to Respondent, Respondent cannot conscientiously urge that there are "special and important reasons" within the meaning of Rule 19 of this Court, why this Court should consider the question now, before it has been decided below. Accordingly, Respondent does not join in Petitioners' alternate suggestion** that this Court should set the Rule 73 question down for argument, because of its own significance or as a vehicle for resolving any supposed conflict between the circuits in other cases involving Rule 73 questions. If, upon remand, the disposition by the Court of

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* Petitioners are equally in error in contending that Respondent's Petition for Rehearing fails to meet the standards of Rule 58(2) of this Court. That Rule relates solely to petitions for rehearing of orders granting or denying writs of certiorari. Respondent, of course, seeks rehearing not of that portion of the Court's order granting certiorari, but of that portion remanding the cause, and hence Rule 58(1) governs.

** Petitioners' Brief Opposing Respondent's Petition for Rehearing, p. 8.

Appeals of the Rule 73 issue leaves an important question or a basis for suggesting a conflict between *that* decision and the decision of any other Court of Appeals, it will then be appropriate for this Court to consider, upon proper petition, whether it desires to examine the issue. Meanwhile, the time of this Court need not be spent on the question, particularly since it is hardly susceptible of summary determination, as appears from the opposing contentions of the parties even as briefly developed in the rehearing papers. For these reasons, this case should follow the customary course of letting issues mature through consideration below.

Respectfully submitted,

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January 2, 1964

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